SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 567

SPIELMAN MOTOR SALES CO., INC., APPELLANTS,

vs.

WILLIAM C. DODGE, AS DISTRICT ATTORNEY OF NEW YORK COUNTY, STATE OF NEW YORK

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

SPIELMAN MOTOR SALES CO., INC., Complainant-Appellant,

against

WILLIAM C. DODGE, as District Attorney of New York County, State of New York, Defendant, Appellee.

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the following enumerated papers constitute the papers to be printed in the Record on Appeal in the transcript of the record, and the same are true copies of the originals on file in the above Court:

1. Order to Show Cause.
2. Bill of Complaint.
3. Exhibit A—Code.
4. Exhibit B—Laws 1933, Chapter 781.
5. Affidavit of David Spielman dated August 1, 1934.
6. Affidavit of S. Frederick Placer dated August 2, 1934.
7. Affidavit of Edna Sperl Burke, dated July 23, 1934.
8. Affidavit of Harold Pefit, dated July 21, 1934.
9. Affidavit of Alexander J. Russell dated July 21, 1934.
10. Affidavit of Henry Caplan dated July 22, 1934.
11. Affidavit of George Shapiro, dated July 22, 1934.
12. Order dated August 8, 1934.
13. Affidavit of John B. Hulitt dated August 16, 1934.
14. Affidavit of Harold H. Straus, dated August 15, 1934.
15. Affidavit of Jack Frost, dated August 15, 1934.
16. Exhibit A, Nat. Auto Dealers Assn.—Release.
17. Exhibit B, dated December 11, 1933.
18. Affidavit of K. J. Ammerman dated August 15, 1934.
19. Affidavit of K. J. Ammerman dated August 15, 1934.
20. Exhibit A, dated June 16, 1933.
21. Exhibit B, dated July 15, 1933.
22. Exhibit C, dated July 15, 1933.
23. Exhibit D, dated September 8, 1933.
24. Exhibit E, dated September 5, 1933.
25. Exhibit G, dated April 28, 1934.

26. Exhibit I, dated December 30, 1933.
27. Affidavit of Ralph Ebbett, dated August 15, 1934.
28. Affidavit of Hiram Bates Pope, dated August 15, 1934.
29. Exhibit A (Test Poll).
30. Exhibit B (Test Poll).

[fol. 3] 31. Affidavit of Oscar F. Pearson dated August 15, 1934.

32. Exhibit A, List of passenger car manufacturers.
33. Affidavit of Albert Blogg Unger, dated August 16, 1934.
34. Form Affidavit—57 signatures.
35. Affidavit of Mr. Spielman dated August 28, 1934.
36. Affidavit of Gabriel Cohen, dated August 28, 1934.
37. Exhibit A, dated August 14, 1934.
38. Affidavit of John B. Hulett, dated September 8, 1934.
39. Exhibit A, Resolution Union Auto Trade Assn.
40. Exhibit B, Resolution, N. J. Automotive Trade Assn.
41. Affidavit of Ralph Ebbert, dated September 7, 1934.
42. Affidavit of Stephan Boyers dated September 7, 1934.
43. Affidavit of Irene Keenan, dated September 8, 1934.
44. Affidavit of John G. Gross, dated September 8, 1934.
45. Affidavit of Louis H. Wessels, dated Sept. 6th, 1934.
46. Affidavit of G. E. Porter and H. V. Flannery, dated September 5, 1934.
47. Affidavit of John G. Gross and Gerald Foley, dated September 7, 1934.
48. Affidavit of Jack Frost, dated September 6th, 1934.
49. Motion to dismiss Bill of Complaint.
50. Opinion.
51. Final Order dated October 18th, 1934.
52. Order allowing Appeal.
53. Assignment of Errors.
54. Bond on Appeal.
55. Notice of Appeal.
56. Statement of Points to be relied upon.
57. Præcipe.

Dated, New York, November 27th, 1934.

Miller, Paul & Placer, Attorneys for Plaintiff-Appellant.
David Blitzer, Attorney for Defendant-Appellee.

So ordered.

Manton, U. S. D. J.

[fol. 4] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE

Upon the Bill of Complaint herein, duly verified the 1st day of August, 1934, and on file with the Clerk of the above mentioned Court, a copy of which is annexed hereto and made part hereof, the annexed affidavits of David Spielman and S. Frederick Placer, duly sworn to the 1st day of August, 1934, and the annexed affidavits of respective motor vehicle dealers, it is

Ordered, that the defendant, William C. Dodge, District Attorney of the County of New York, State of New York, show cause at a term of this Court duly convened pursuant to Section 380 of the United States Code, to be held in and for the Southern District of New York, in the United States Courthouse, Post Office Building, in the Borough of Manhattan, City and State of New York, on the 7th day of August, 1934, at 10:30 A. M. in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be made and entered herein enjoining, restraining and prohibiting the defendant herein, his deputies, assistants, servants, agents and/or employees, and successors, pendente lite from in any way or manner, by suit at law or in equity or by way of criminal prosecution or otherwise, [fol. 5] enforcing as against the complainant herein any of the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, Complainant's Exhibit "A", annexed to the Bill of Complaint herein, more particularly, but not exclusively, Article IV thereof, under and by virtue of Chapter 781 of the Laws of 1933 of the State of New York, by reason of the unconstitutionality of the said Chapter 781 of the Laws of 1933 of the State of New York, as is more fully and at length set forth in the Bill of Complaint and affidavits annexed hereto.

Sufficient reason appearing therefor, let a copy of this order and the papers upon which the same is based be served upon the defendant herein, and on John J. Bennett, Jr., Attorney General of the State of New York, and the Honorable Herbert H. Lehman, Governor of the State of New York, as provided by Title 28, Section 380, of the

United States Code, on or before the 6th day of August, [fol. 6] 1934, which said service when so made shall be deemed sufficient.

Dated, New York, August 3rd, 1934, Southern District of New York.

Woolsey Judge of the United States District Court,
Southern District of New York. C. W.

[fol. 7] In United States District Court, Southern District of New York

[Title omitted]

Bill of Complaint

To the Honorable Justices of the District Court, for the Southern District of New York:

Complainant above named, by Miller, Paul & Placer, its attorneys and solicitors, complaining of the defendant, respectfully alleges:

First: That at all the times hereinafter mentioned and ever since the year 1923, Spielman Motor Sales Co., Inc., was and still is a corporation, duly incorporated and existing under and by virtue of the Laws of the State of New York, and at all the times hereinafter mentioned, was and still is engaged in the business and trade of buying and selling motor vehicles, motor vehicle parts and accessories, and the general service and repair of motor vehicles, and except for the manufacture of automobiles and parts, is engaged generally in the motor vehicle business.

Second: That the complainant has conducted and operated and still does conduct and operate its business within [fol. 8] the territorial confines of the said State of New York, having its principal place of business in the Borough of Brooklyn, County of Kings, City and State of New York.

Third: That the complainant, together with its affiliate, Spielman Chevrolet Corporation, a corporation existing under and by virtue of the Laws of the State of New York, conducts its business at the following addresses:

220 Greenpoint Avenue, Borough of Brooklyn, City of New York.

379 Broadway, Borough of Brooklyn, City of New York.
Union and Montrose Avenues, Borough of Brooklyn, City of New York.
185 Canal Street, Borough of Manhattan, City of New York.
250 Hudson Street, Borough of Manhattan, City of New York.

Fourth: That Spielman Motor Sales Co. Inc., in the operation, conduct and management of its business aforesaid, employs approximately eighty employees in the divers divisions of its business enumerated above.

Fifth: That Spielman Motor Sales Co. Inc., in the establishment and conduct of its aforesaid business, has expended vast and considerable sums of money, time and effort, and has developed a good will amongst its customers and patrons of immeasurable value.

Sixth: That heretofore and on or about the 16th day of June, 1933, an Act of Congress commonly known as the [fol. 9] National Industrial Recovery Act, was enacted by it, and by the signature of the President of the United States, became the apparent law of the United States.

Seventh: That in the aforesaid Act, the declaration of a national emergency was declared to be in existence at the time of the said enactment by the following declaration:

"Title I—Industrial Recovery

Declaration of Policy

S. 1.

(10) Policy of the Act) A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate

governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

Eighth: That by virtue of the said Act, it was provided for the adoption of certain Codes of Fair Competition for the various and divers industries within the United States, it being expressly provided, however, by Chapter 3a of the said National Industrial Recovery Act, that any such Code or Codes submitted for approval to the President of the United States shall not permit monopolies or monopolistic practices.

[fol. 10] Ninth: That heretofore and on or about the 3rd day of October, 1933, and purportedly pursuant to the provisions of Article I of the National Industrial Recovery Act, as approved by the President of the United States, on June 16th, 1933, a Code of Fair Competition for retail motor vehicle dealers, commonly known as the Motor Vehicle Retailing Code, was submitted to the Honorable President of the United States, under and by virtue of the provisions of the said National Industrial Recovery Act, and the said Motor Vehicle Retailing Code, as submitted, was approved by the President of the United States, pursuant to the apparent authority vested in him in Article I of the National Industrial Recovery Act. A true copy of the said Code of Fair Competition for the Motor Vehicle Retailing Trade is annexed hereto, as "Complainant's Exhibit A."

Tenth: That Article IV, Paragraph A, provides as follows:

"Article IV—Trade Regulations

The provisions of this section will cover the following products: passenger cars, trucks and commercial vehicles with bodies of ¾ ton capacity and less, or such other capacity limitation as may be deemed proper by the administrator.

A. Used Car Allowance

In an effort to prevent sales below cost, heretofore due to unfair competition that has resulted in the dissipation of the large part of the capital originally in this trade and has accumulated large losses since 1926, this trade agrees to regulate itself so as to return profit possibilities and support increased wages and shortened hours.

Giving consideration to the public interest and to prevent sales below cost, it is hereby provided:

(1) That the value of any model of used motor vehicle, either passenger or commercial, shall be the average price that the public in any given market area is then paying for [fol. 11] such vehicle as ascertained by the Association from sworn statements of all actual retail sales to consumers, subject to the approval of the Administrator. The Association shall publish the average prices thus ascertained approximately every 60 days. In order to insure fair average value in the interest of the consumer, published averages shall be computed for the preceding period and there shall not be included in computed for the preceding period and there shall not be included in computing such average that 20% of sales which represented the lowest sales of all actual sales reported in the previous period.

(2) That no dealer shall, directly or indirectly, or by subterfuge, accept in trade any used vehicle at an allowance price of more than its value as ascertained in paragraph (1) above, less a minimum selling, handling, and reconditioning charge, according to the following schedule:

(a) Five percent of the allowance price as determined in paragraph (1) above, on (x) the current series model, or (y) the preceding series model:

(b) Ten percent of the allowance price as determined in paragraph (1) above on the model preceding, the two models described in paragraph (2) sub-section (a) above, namely (x) and (y)..

(c) Fifteen percent of the allowance price as determined in paragraph (1) above, on all models other than the three models described in sub-sections (a) and (b) above.

(3) To provide a record for the establishment of used car allowances in paragraph (1) above, there shall be provided in each logical trading area of the United States an

Official Guide, which shall be provided by the Association which shall be known as the Association Official Guide and shall be recognized as the authority for such allowances, and which shall be based upon actual sales in each trading area for the period of approximately sixty days preceding the date on which the compilation of the official guide is started, as hereinabove provided.

(4) There shall be used as a basis of establishing allowance values, as provided in paragraph (1) and (2), above, [fol. 12] the principle of averaging actual sales at retail to consumer for the preceding period. Since this will, in isolated distances, by reason of very few or no sales on particular models, leave a need to establish a guide figure on such models, the following method of determining the allowance values will be pursued for the public protection, namely,

(a) If any model of motor vehicle described in the Official Guide shows five or more sales at retail to consumer within the district in any period, then the average figure published becomes the maximum allowance for the ensuing period.

(b) If any model of motor vehicle has less than five sales at retail to consumer within the district for the period then the new car dealers handling this particular make car within this district shall establish its allowance value, the same to be so published in the report. These figures to be subject to approval of the Advisory State Committee and the Administrator.

(c) If any make or model or motor vehicle is not represented in the district or is no longer manufactured and less than five sales at retail to consumer are reported on each or any model of such car, then the Advisory State Committee, subject to the approval of the Administrator, will set the figure based on what like models of other makes sell for in the district.

(5) No retailer shall use advertising, whether printed, radio, display or of any other nature, which is inaccurate in any material particular or misrepresents merchandise (including its use, trademark, grade, quality, quantity, size, origin, material, content, or preparation or credit terms, values, policies, or services; and no retailer shall use advertising and/or selling methods which tend to deceive or mislead the customer.

(b) No retailer shall use advertising which refers inaccurately in any material particular to any competitior or his merchandise, prices, values, credit terms, policies or services.

Fair trade practice rules for other products of this Code will be covered in the supplemental Code of Fair Trade Practices to be submitted."

[fol. 13] Eleventh. That heretofore and on or about the 26th day of August, 1933, the legislature of the State of New York, enacted a law entitled: Laws of 1933, Chapter 781, which was duly signed by the Governer of the State of New York, and became effective as apparent law on August 26th, 1933. That annexed hereto and made part hereof is a true copy of the said Laws of 1933, Chapter 781, marked Exhibit "B".

Twelfth. That heretofore and on or about the 5th day of December, 1933, purportedly pursuant to the provisions of the said Chapter 781 of the Laws of 1933, a certified copy of the Code of Fair Competition for the Motor Vehicle Retailing Trade (Complainant's Exhibit A), was filed in the Office of the Secretary of the State of New York, and in the Office of the Department of State thereof, by reason whereof the said Code allegedly became and purportedly is now the said Code of Fair Competition for the Motor Vehicle Retailing Trade for the State of New York.

Thirteenth. That purportedly pursuant to the authority vested by Article IV of the said Code of Fair Competition for the Motor Vehicle Retailing Trade, an Official Guide known as the "Association Official Guide" book was compiled and composed by National Automobile Dealers Association, a trade association incorporated under the Laws of Illinois, with its principal office at #1010 Pine Street, St. Louis, Missouri, which said Official Guide Book purportedly creates and establishes alleged "average" prices for used motor vehicles, which said "average" prices represent the alleged maximum allowance permitted to be paid to prospective purchasers on their used motor vehicles, on their trade-in, to a dealer on the purchase of a new automo-
[fol. 14] bile pursuant to Article IV, Subdivision A, Paragraph 1.

Fourteenth. That pursuant to the provisions of Chapter 781 of the Laws of 1933, it is a violation of the said Motor Vehicle Retailing Code and the said Chapter 781 of the Laws of 1933, for any retail motor vehicle dealer to offer or give a prospective customer a trade-in of a used car on the purchase of a new motor vehicle, a price for his said used motor vehicle, in excess of that allegedly fixed in the said Official Guide Book, and by virtue of the said Chapter 781 of the Laws of 1933, said violation constitutes a misdemeanor, punishable by a fine not exceeding Five Hundred Dollars.

Fifteenth. That Article IV, Subdivision B, paragraph 2, provides as follows:

"(2) No dealer or representative shall offer or give any discount, gratuity, commission, service or accessory, to a customer or his agent, for the purpose of inducing the customer or his agent, to purchase a car. Nothing herein shall prevent conduct pursuant to any warranty of the manufacturer."

Sixteenth. That any violation of the said Article IV, Subdivision B, Paragraph 2, is a misdemeanor within the provisions of Chapter 781 of the Laws of 1933, punishable by a fine not exceeding $500.00.

Seventeenth. That the defendant, William C. Dodge, is the duly elected District Attorney for the County of New York, State of New York, and holding such office under and by virtue of the several laws of the State of New York pertaining thereto.

[fol. 15] Eighteenth. That under and by virtue of the several Laws of the State of New York, it is the duty of the said defendant, as such District Attorney for the said County of New York, to prosecute in an official capacity, and when required by the public service or when otherwise directed by the Attorney General of the State of New York, to prosecute all violation of law and public offenses, and to conduct such prosecutions for such violations of law in the name of the People of the State of New York.

Nineteenth. That prior to the 3rd day of October, 1933, the complainant herein did offer to the public, its customers and patrons, actual, fair and honest values for used

automobiles that were offered to it by prospective customers on the purchase of new automobiles.

Twentieth. That the complainant herein, in accordance with the policies of the Act of Congress expressed in the National Industrial Recovery Act, has duly cooperated in the rehabilitation of industry, and has duly complied with all provisions of the Code of Fair Competition, and more particularly, has paid its employees more than the minimum wages prescribed by the said Code, and has worked its employees not more than the maximum hours provided for by the said Code. That in furtherance of the declaration of the policy by the Congress, it has employed additional employees and has otherwise striven to effectuate the policies of the Congress, except as hereinafter alleged.

Twenty-first. That by allowing customers and patrons of the complainant, actual, fair and honest values for used car trade-ins on the purchase of new automobiles, such prices being higher or lower than the "average", purportedly fixed in the said Official Guide, complainant, after [fol. 16] duly complying with all other provisions of the Motor Vehicle Retailing Code, makes a fair return and profit on its investment.

Twenty-second. That but for the adoption and approval of the Code by the President of the United States, in violation of the intent and purposes of the Congress, and but for the establishment, fixation and issuance of the aforesaid prices in the said Official Guide Book, and their apparent sanction of law, purportedly pursuant to the said Chapter 781 of the Laws of 1933 of the State of New York, but for the fact that the said Chapter 781 of the Laws of 1933 of the State of New York, by its terms inflicts a heavy penalty upon any person, firm or corporation violating the same, but for the fear that the complainant has that the severe penalties thereof will be visited upon it as hereinafter alleged, this complainant would continue to conduct, operate and manage its business in accordance with the rights, liberties and privileges granted to it under the Constitution of the United States and of the State of New York, and the several amendments thereto.

Twenty-third. That heretofore and on or about the 7th day of July, 1934, the defendant openly, publicly and other-

wise proclaimed to this complainant that he was prepared and was through his office as District Attorney of the County of New York, State of New York, ready to commence and institute a criminal prosecution against the complainant herein for alleged violation of the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, acting under and pursuant to the purported [fol. 17] authority of Chapter 781 of the Laws of 1933 of the State of New York, and that the said defendant is preparing and is about to commence criminal prosecution against the complainant and others similarly situated, for alleged violations of the Code of Fair Competition of the Motor Vehicle Retailing Trade, more particularly for violation of Article IV, Subdivision A, Paragraph 1, and Article IV, Subdivision B, Paragraph 2.

Twenty-fourth. That heretofore and on or about the 7th day of July, 1934, an application was made by the defendant and his several assistants to a Magistrate of the City of New York, County of New York, in the name of the People of the State of New York, for the issuance by the said Magistrate, of a summons, directing and requiring the complainant herein to appear before the said City Magistrate, or any City Magistrate holding Court at the City Magistrate's Court, at 301 Mott Street, in the Borough of Manhattan, City, County and State of New York, on the 9th day of July, 1934, at ten o'clock A. M., to the end that investigation be made of an alleged complaint against the complainant herein, for alleged and purported violation of the provisions of the Motor Vehicle Retailing Code, and that upon such investigation, an information be drawn against the complainant herein for alleged violation, charging it with the violation of the aforesaid provisions of the Motor Vehicle Retailing Code.

Twenty-fifth. That the said defendant herein is purportedly acting under and by virtue of the authority purportedly vested in him by the aforesaid Chapter 781 of the Laws of 1933 of the State of New York.

[fol. 18] Twenty-sixth. That the defendant as District Attorney of the County of New York, State of New York, will, unless restrained from so doing by an order of this Honorable Court, institute criminal proceedings in a Court of competent jurisdiction, to enforce the provisions of the

Code of Fair Competition for the Motor Vehicle Retailing Code and the Official Guide, against the complainant herein, for its purported violation of the said Code and Official Guide, and in the event that complainant refuses to comply with the said pretended law, and in the event of conviction for such purported violation, complainant will be subject to the heavy penalties prescribed to be inflicted upon it by virtue of the said Chapter 781 of the Laws of 1933, which said penalties, if complainant be compelled to pay, will be a deprivation of its rights, liberties, properties and immunities, without due process of law, as herein alleged.

Twenty-seventh. That in the event that complainant is compelled to abide by the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, more particularly by the prices fixed in the Official Guide Book, having apparent sanction of law pursuant to Chapter 781 of the Laws of 1933, and is compelled to charge the arbitrary, unreasonable, harsh, oppressive and inequitable prices purportedly fixed, promulgated, established and issued, complainant cannot continue in its aforesaid lawful business, in which event it will be deprived of its rights, liberty, property, privileges and immunities, without due process of law.

Twenty-eighth. That unless the relief prayed for herein- [fol. 19] after is granted unto the complainant, temporarily and permanently, it will suffer irreparable damage, the exact amount thereof being now and will be incalculable of exact determination.

Twenty-ninth. That the Code of Fair Competition for the Motor Vehicle Retailing Trade, Complainant's "Exhibit A", more particularly Article IV, Subdivision A, Paragraph 1, and Article IV, Subdivision B, Paragraph 2, hereinabove alleged, and the Official Guide, purportedly issued pursuant thereto, having the apparent sanction of law by virtue of Chapter 781 of the Laws of 1933, of the State of New York, are unconstitutional, null and void, being repugnant to the Fourteenth Amendment to the Constitution of the United States, the Constitution of the State of New York, and are illegal, null and void, being in direct violation of the intents and purposes of the Congress in the enactment of the National Industrial Recovery Act, more

particularly being repugnant and violative of Chapter I and Chapter 3a of the National Industrial Recovery Act.

Thirtieth. That the National Industrial Recovery Act and the Code of Fair Competition for the Motor Vehicle Retailing Trade are unconstitutional, null and void, being violative of the Constitution of the United States, and more particularly the Fifth Amendment thereof.

Thirty-first. That this suit is authorized by law to be brought by the complainant, to redress the deprivation of its rights, privileges, property and immunities secured to it [fol. 20] by the Constitution of the United States, more particularly the Fourteenth Amendment thereof, and the Constitution of the State of New York, and this suit is further authorized to be brought by this complainant, by virtue of the unconstitutionality of Chapter 781 of the Laws of 1933, the Code of Fair Competition of the Motor Vehicle Retailing Trade, Article IV, Subdivision A, Paragraph 1, and Article IV, Subdivision B, Paragraph 2 thereof, and the Official Guide, and by virtue of the acts of the defendant herein, proceeding herein under their apparent sanction of law.

Thirty-second. That complainant has no adequate remedy at law and can only have relief in a Court of equity.

Wherefore, complain-t prays that a decree of this Court be made herein, adjudging as follows:

1. That complainant's Exhibit "A", the Code of Fair Competition for the Motor Vehicle Retailing Trade, is null, void and invalid, having been adopted and approved by the President of the United States in violation of the National Industrial Recovery Act, more particularly Chapter 1 and Chapter 3a thereof.

2. That more particularly Article IV of complainant's Exhibit "A" of the said Official Guide Book as provided in said Article IV, is invalid, null, void and unconstitutional, being repugnant to the Fourteenth Amendment of the Constitution of the United States and that the same deprives Complainant of its rights, liberty and property without due process of law.

3. That Chapter 781 of the Laws of 1933 of the State of New York, is invalid, null, void and unconstitutional, by

reason of the illegal manner of enactment, as providing for excessive punishment, as an improper delegation of legislative function in violation of the Constitution of the State of New York, and repugnant to the Fourteenth Amendment of the Constitution of the United States in that it deprives the complainant of its rights and property without due process of law.

[fol. 21] 4. That Chapter 781 of the Laws of 1933 of the State of New York, the Code of Fair Competition for Motor Vehicle Retailing Trade and the Official Guide Book issued pursuant thereto, are invalid, null, void and unconstitutional in that they deprive the complainant of its rights, liberty and property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

5. That the National Industrial Recovery Act, the Code of Fair Competition for the Motor Vehicle Retailing Trade and the Official Guide Book are invalid, null, void and unconstitutional in that the National Industrial Recovery Act was enacted by the Congress in excess of the power granted to it by the Constitution of the United States, as providing for excessive punishment, as an improper delegation of legislative power by the Congress to the President, and as depriving the complainant of its rights, liberty and property, in derogation and violation of the Fifth Amendment to the Constitution of the United States.

6. That the defendant, William C. Dodge, as District Attorney for the County of New York, State of New York, his successors, assistants, deputies, agents and employees be temporarily and permanently enjoined from in any way or manner enforcing against the complainant any of the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, more particularly the provisions of Article IV thereof, and any order, rule or regulation that may be issued thereunder or that has been issued thereunder or any of the price regulations fixed and promulgated in the Official Guide Book as provided by Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade or any part or parts thereof, and from instituting or causing to be instituted any suit at law or in equity, prosecution or proceeding or otherwise as the case may be against the complainant herein for any alleged violation of

any of the provisions of the said Code of Fair Competition for the Motor Vehicle Retailing Trade under Chapter 781 of the Laws of 1933 of the State of New York.

7. That a temporary restraining order be granted before the hearing and determination of any application made for an injunction pendente lite, because of the facts as herein alleged, irreparable loss and damage will result to the complainant unless such temporary restraining order be granted.

8. That the complainant have such other, further and different relief as may be just and equitable, as well as a decree for costs.

9. That a Writ of Subpœna of the United States of [fol. 22] America, issue out of and under the seal of this Honorable Court, directed to the defendant herein named and under a certain penalty to be and appear before this Court, then and there to answer under oath all and singular the premises and allegations of this Bill of Complaint and to stand and abide by such order, direction and decree as the Court may make in the premises.

Miller, Paul & Placer, Attorneys and Solicitors for Complainant, Office & P. O. Address, No. 276 Fifth Avenue, Borough of Manhattan, City of New York.

[fol. 23] *Duly sworn to by David Spielman. Jurat omitted in printing.*

[fol. 24] EXHIBIT "A" TO BILL OF COMPLAINT

Approved Code No. 46—Reprint. Registry No. 1403—32

National Recovery Administration

Code of Fair Competition for the Motor Vehicle Retailing Trade as Approved on October 3, 1933, by President Roosevelt

Includes Amendment No. 1

[fol. 25] This publication is for sale by the Superintendent of Documents, Government Printing Office, Washington,

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[fol. 26] Approved Code No. 46

Code of Fair Competition for the Motor Vehicle Retailing Trade as Approved on October 3, 1933 by President Roosevelt

Executive Order

An application having been duly made, pursuant to and in full compliance with the provisions of Title I of the National Industrial Recovery Act, approved June 16, 1933,

for my approval of a Code of Fair Competition for the Motor Vehicle Retailing Trade, and hearings having been held thereon and the Administrator having rendered his report containing an analysis of the said Code of Fair Competition together with his recommendations and findings with respect thereto, and the Administrator having found that the said Code of Fair Competition complies in all respects with the pertinent provisions of Title I of said Act and that the requirements of clauses (1) and (2) of subsection (a) of Section 3 of the said Act have been met:

Now, therefore, I, Franklin D. Roosevelt, President of the United States, pursuant to the authority vested in me by Title I of the National Industrial Recovery Act, approved June 16, 1933, and otherwise do adopt and approve the report, recommendations, and findings of the Administrator and do order that the said Code of Fair Competition be and it is hereby approved.

Franklin D. Roosevelt.

Approval recommended: Hugh S. Johnson, Administrator.

The White House, October 3, 1933.

[fol. 27] September 20, 1933.

The President, The White House.

My Dear Mr. President:

I have the honor to submit and recommend for your appproval the Code of Fair Competition for the Motor Vehicle Retailing Trade. The Code has been approved by the Industrial Advisory Board, the Labor Advisory Board, and the Consumers' Advisory Board.

An analysis of the provisions of the Code has been made by the Administration and a complete report is being transmitted to you.

I find that the Code complies with the requirements of clauses 1 and 2, subsection (a) of section 3 of the National Industrial Recovery Act.

I am, my dear Mr. President,

Very sincerely yours, Hugh S. Johnson, Administrator.

[fol. 28] Code of Fair Competition for the Motor Vehicle Retailing Trade

Article I—Purpose

This Code is adopted for the purpose of increasing employment, establishing fair and adequate wages, affecting necessary reduction of hours, improving standards of labor, and eliminating unfair trade practices to the end of rehabilitating the Motor Vehicle Retail Trade and enabling it to do its part toward establishing that balance of trades which is necessary to the restoration and maintenance of the highest practical degree of public welfare. It is the declared purpose of the Motor Vehicle Retail Trade to bring, insofar as may be practicable, the rates of wages paid within the Motor Vehicle Retail Trade to such levels as are necessary for the creation and maintenance of the highest practicable standard of living; to restore the income of enterprises within the trade to levels which will make possible the payment of such wages and avoid further depletion and destruction of capital assets; and from time to time to revise the rates of wages in such manner as will currently reflect the equitable adjustment to variations in the cost of living.

Article II—Definitions

Wherever in this Code, or in any proceeding under or in connection with this Code, the following words or terms are used, they shall be deemed and taken to have the meanings ascribed to them as follows:

The word "Dealer" includes, but without limitation, any individual, partnership, association, trust, or corporation engaged in whole or in part in the business of motor vehicle retailing.

The term "Exclusive or Independent Used-Car Dealer" shall mean a dealer selling used motor vehicles, who may likewise service or repair such used motor vehicles, and who does not hold an authorized new-car dealer's franchise.

The term "Motor Vehicle Retailing" shall mean the business of retailing new or used motor vehicles, and the servicing or repairing of new or used motor vehicles by persons engaged in retailing new or used motor vehicles.

The term "Motor Vehicles" as used herein means automobiles, including passenger cars, trucks, truck tractors, busses, taxicabs, hearses, ambulances, and other commer-
[fol. 29] cial vehicles, for use on the highway and excluding motorcycles, fire apparatus, and tractors other than truck tractors.

The term "Association" as used herein means National Automobile Dealers Association, a trade association incorporated under the laws of Illinois, having its principal office at No. 1010 Pine Street, St. Louis, Mo.

The term "President" shall mean the President of the United States.

The term "Administrator" shall mean the Administrator appointed under Title I of the National Industrial Recovery Act.

The term "Act" shall mean the National Industrial Recovery Act of 1933.

The term "Code" shall mean the Code of Fair Practice of the Motor Vehicle Retail Trade.

The term "Member of the Code" shall mean and include any member of the Motor Vehicle Retailing Trade who shall signify assent to this Code.

Article III—Employment Regulations

A. Labor

(1) Employees of the Motor Vehicle Retailing Trade shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection;

(2) No employee of the Motor Vehicle Retailing Trade and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and

(3) Employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment approved or prescribed by the President.

B. Wages and Hours

(1) No person under 16 years of age shall be employed in the Motor Vehicle Retailing trade, provided, however, that where a State law provides a higher minimum age, no person below the age specified by such State law shall be employed within that State.

(2) No employee (except outside commission salesmen and watchmen) shall be employed for more than 44 hours in any 1 week. These maximum hours refer to the availability of the emloyee in the shop or premises of the employer at the latter's request, whether or not the employee is actively engaged in specific tasks throughout these hours. All places of business shall be kept open not less than 52 hours a week, unless such hours were less than 52 hours per week before July 1, 1933, and in which case such hours shall not be reduced at all.

[fol. 30] (3) The maximum hours fixed in the foregoing paragraph (2) shall not apply to salaried employees in a managerial, executive, or supervisory capacity who receive $30 per week or more.

(4) Not to pay any employees, except as hereinbelow provided, less than $15 per week in any city of over 500,000 population, or in the immediate trade area of such city, nor less than $14.50 per week in any city of between 250,000 and 500,000 population, or in the immediate trade area of such city; nor less than $14 per week in any city of between 2,500 and 250,000 population, or in the immediate trade area of such city; nor less than $13 per week in towns of 2,500 or less, except that one washer or greaser or porter or helper or aged or physically handicapped worker may be employed at less than $13 per week in such establishment; and except that in establishments employing more than 19 employees the number of such employees who are paid less than $13 per week may equal but not exceed 10 percent of the total number of employees in any such establishment; and provided further that no employee shall be paid less than $13 per week who was not receiving less than this wage on August 1, 1933; and provided further that the wages of any employee receiving less than $13 per week shall be increased by at least 20 percent, despite his shortened hours, provided, however, that no employer is required to raise the wages of any such employee above $13 per week.

(5) Full-time outside salesmen, who are unrestricted as to hours and receive remuneration on a commission basis, shall be guaranteed a drawing account of not less than $17.50 a week in any city of over 500,000 population, or in the immediate trade area of such city; nor less than $15 per week in any city between 250,000 and 500,000 population, or in the immediate trade area of such city; nor less than $12.50 per week in any city between 2,500 and 250,000 population, or in the immediate trade area of such city; and in towns of less than 2,500 population all salesmen shall be guaranteed not less than $10 per week.

An apprentice salesman is excepted from this guaranty until he has served at least 3 months—2 months of which must be served with employer last employing him. Such apprentices shall be limited to 1 for each 10 regular salesmen, or fraction thereof.

Population and trade area for the purpose of this article shall be determined by reference to the 1930 Federal census; except that the Emergency National Committee with the approval of the Administrator shall have the power to alter trade areas.

(6) No mechanic employed in this trade shall be paid less than 50 cents per hour unless the hourly rate for the same class of work on July 15, 1929, was less than 50 cents per hour, in which latter case such mechanic shall be paid not less than the hourly rate of July 15, 1929, and in no event less than 40 cents per hour. The weekly minimum wages established in paragraph (4) above shall also apply to mechanics covered by this paragraph (6).

(7) Paragraph (4) and paragraph (6) establish guaranteed minimum wages regardless of whether the employee is compensated on the basis of a time rate or a flat rate performance or otherwise.

(8) No dealer shall reduce the compensation for employment now in excess of the minimum wages hereby provided (notwithstanding that the hours worked in such employment may be hereby reduced) and each dealer shall increase [fol. 31] the pay for such employment by an equitable readjustment of all pay schedules.

(9) No dealer shall use any subterfuge to frustrate the spirit and intent of this Code, which is, among other things,

to increase employment, to remove obstructions to commerce, and to shorten hours and to raise minimum wages for the shorter week to a living basis.

(10) No dealer shall increase the price of any merchandise sold after the date hereof over the price on July 1, 1933, by more than is made necessary by actual increases in wages, or invoice costs of merchadise, or by taxes, since July 1, 1933, and in setting such price increases each dealer shall give full weight to probable increases in sales volume and to refrain from taking profiteering advantage of the consuming public.

(11) The maximum hours herein above provided mark the total number of hours which may be worked by any employee; whether he works for one or more employers; provided, however, that if any employee works more than such aggregate maximum without the knowledge or connivance of any one of his employers, such employer shall not be deemed to have violated this paragraph.

(12) No employee shall be classified in any of the excepted classes hereinabove unless such employee performs duties identical with those performed by employees thus classified on June 16, 1933.

Article IV—Trade Regulations

The provisions of this section will cover the following products: passenger cars, trucks and commercial vehicles with bodies of ¾ ton capacity and less, or such other capacity limitation as may be deemed proper by the administrator.

A. Used Car Allowance

In an effort to prevent sales below cost, heretofore due to unfair competition that has resulted in the dissipation of the large part of the capital originally in this trade and has accumulated large losses since 1926, this trade agrees to regulate itself so as to return profit possibilities and support increased wages and shortened hours.

Giving consideration to the public interest and to prevent sales below cost, it is hereby provided:

(1) That the value of any model of used motor vehicle, either passenger or commercial, shall be the average price

that the public in any given market area is then paying for such vehicle as ascertained by the Association from sworn statements of all actual retail sales to consumers, subject to the approval of the Administrator. The Association shall publish the average prices thus ascertained approximately every 60 days. In order to insure fair average value in the interest of the consumer, published averages shall be computed for the preceding period and there shall not be included in computing such average that 20% of sales which represented the lowest sales of all actual sales reported in the previous period.

(2) That no dealer shall, directly or indirectly, or by subterfuge, accept in trade any used vehicle at an allowance price of more than its value as ascertained in paragraph (1) above, less a minimum selling, handling, and recondi- [fol. 32] tioning charge, according to the following schedule:

(a) Five percent of the allowance price as determined in paragraph (1) above, on (x) the current series model, or (y) the preceding series model:

(b) Ten percent of the allowance price as determined in paragraph (1) above on the model preceding, the two models described in paragraph (2) sub-section (a) above, namely (x) and (y).

(c) Fifteen percent of the allowance price as determined in paragraph (1) above, on all models other than the three models described in sub-sections (a) and (b) above.

(3) To provide a record for the establishment of used car allowances in paragraph (1) above, there shall be provided in each logical trading area of the United States an Official Guide, which shall be provided by the Association which shall be known as the Association Official Guide and shall be recognized as the authority for such allowances, and which shall be based upon actual sales in each trading area for the period of approximately sixty days preceding the date on which the compilation of the official guide is started, as hereinabove provided.

(4) There shall be used as a basis of establishing allowance values as provided in paragraphs (1) and (2), above, the principle of averaging actual sales at retail to consumer for the preceding period. Since this will, in isolated instances, by reason of very few or no sales on par-

ticular models, leave a need to establish a guide figure on such models, the following method of determining the allowance values will be pursued for the public protection, namely,

(a) If any model of motor vehicle described in the Official Guide shows five or more sales at retail to consumer within the district in any period, then the average figure published becomes the maximum allowance for the ensuing period.

(b) If any model of motor vehicle has less than five sales at retail to consumer within the district for the period then the new car dealers handling this particular make car within this district shall establish its allowance value, the same to be so published in the report. These figures to be subject to approval of the Advisory State Committee and the Administrator.

(c) If any make or model or motor vehicle is not represented in the district or is no longer manufactured and less than five sales at retail to consumer are reported on each or any model of such car, then the Advisory State Committee, subject to the approval of the Administrator, will set the figure based on what like models of other makes sell for in the district.

(5) No retailer shall use advertising, whether printed, radio, display or of any other nature, which is inaccurate in any material particular or misrepresents merchandise (including its use, trademark, grade, quality, quantity, size, origin, material, content, or preparation or credit terms, values, policies, or services; and no retailer shall use advertising and/or selling methods which tend to deceive or mislead the customer.

(b) No retailer shall use advertising which refers inaccurately in any material particular to any competitor or his merchandise, prices, values, credit terms, policies or services.

[fol. 33] Fair trade practice rules for other products of this Code will be covered in the Supplemental Code of Fair Trade Practices to be submitted.

B. Marketing Rules

The following Marketing Rules shall take effect 30 days after the approval by the President:

(1) No dealer shall sell a new car at retail to a customer for less than factory list prices, plus an amount equal to—

(a) Equipment at listed prices.

(b) All taxes paid by dealer applicable to the motor vehicle sold.

(c) Average cost of transportation from factory of said dealer or shipments received by said dealer during a 60-day period as shown by sworn statement of said dealer.

(d) Dealer's actual cost of handling (including such items as (w) unloading, (x) assembling, (y) conditioning for delivery, and (z) interest actually paid by said dealer, but not to exceed 90 days on cost of transportation).

The only exceptions to these prices shall be sales to proprietors' immediate families or members of his organization when for the personal use of such buyer. Motor vehicles sold to employees for use in their employer's business as demonstrators or executives' cars, and cars used as demonstrators by dealer, must be so registered with their trade association, or with the State Advisory Committee; demonstrators' and executive cars shall not be sold to a consumer at retail for less than the full retail price except when they have been in use for a period of at least 60 days from the date of registration, as aforesaid, and have had at least 3,500 miles actual road usage, or when the manufacturers has made public announcement of a change in model.

(2) No dealer or representative shall offer or give any discount, gratuity, commission, service, or accessory, to a customer or his agent, for the purpose of inducing the customer or his agent to purchase a car. Nothing herein shall prevent conduct pursuant to any warranty of the manufacturer.

(3) Charges for financing retail conditional sales shall be upon an equitable basis to consumer and dealer. No dealer in financing conditional retail sales shall charge a lower rate than the lowest or a higher rate than the highest rate charged by regularly established finance companies operating in the same district at the dealer.

(4) With the approval of the State Advisory Committee and the manufacturer concerned, a dealer will be permitted to sell and offer for sale, new cars that have been discon-

tinued or are about to be discontinued at less than delivered prices as described in the first paragraph of this section. The intent of this provision is to enable dealers to dispose of their own or their factories' stock. In the event that approval is refused, or that no action is taken within 10 days by the said Committee or the manufacturer, said dealer shall have right of appeal to the Administrator, whose decision shall be final.

(5) With the approval of the State Advisory Committee and the manufacturer concerned, the dealer may sell or offer for sale, any open type of new car at less than delivered price, as described in the first paragraph of this [fol. 34] section, provided the dealer will present a sworn statement showing that such car has been included in said dealer's inventory for a period of not less than 45 days. The intent of this provision is to enable a dealer to dispose of a type of car which is or may shortly become difficult to sell because of a change in seasons. In the event that approval is refused or that no action is taken within 10 days by the said committee or the manufacturer, said dealer shall have right of appeal to the Administrator, whose decision shall be final.

(6) It shall be an unfair trade practice for any new car dealer or representative to sell or permit to be sold any new motor vehicle for resale in a territory already enfranchised for that make of motor vehicle except through a regularly enfranchised dealer in that territory and it shall also be an unfair trade practice for any dealer to purchase a vehicle as above prohibited.

(7) The retail list price for parts, accessories, and supplies will be the manufacturers' published list price adjusted to include all taxes. It shall be an unfair trade practice for any dealer to sell such parts, accessories, and supplies at other than retail list price, except to duly authorized dealers, associate or sub-dealers, or established service stations, operating under any NRA Code.

(8) A dealer shall on delivery of a new car from the manufacturer, inspect and ascertain that the speedometer on the new car is connected before using the car for any purpose. A dealer shall not disconnect the speedometer or permit it to be disconnected. The purpose of this pro-

vision is to insure the customer having full knowledge of the mileage traveled by the motor vehicle which is offered for retail sale.

C. Trade Practice Rules

The Emergency National Committee shall hold a trade practice conference as often as may be necessary for the purpose of making recommendations to the Administrator in regard to the establishment and amending of rules of fair trade practice for the Trade.

Article V—Districts of the Industry

A. For the purpose of the administration of this Code, there shall be in each State an advisory committee consisting of not less than five, one of whom shall be elected from the exclusive or independent used car dealers, elected by the dealers of such State, in convention or by mail vote. The chairman of each State Advisory Committee shall be a member of the Emergency National Committee. The Vice Chairman of each State Advisory Committee shall be an alterate member of the Emergency National Committee.

Each such State Advisory Committee shall constitute the fair practice and planning agency to cooperate with the Administrator in respect to problems relating exclusively to the said State. Proposals in respect to matters affecting more than one State may be initiated by any State Advisory Committee and shall be submitted for consideration to the Emergency National Committee of the motor vehicle retailing trade hereinafter described and its determination, subject to the approval of the Administrator, shall be binding upon said State and all other States affected thereby. [fol. 35] For the purpose of the administration of this Code, the District of Columbia, Metropolitan New York, and the rest of New York, Metropolitan Chicago, and the rest of Illinois, shall be considered one State.

States may be divided or rearranged upon application of any association or group of associations subject to the approval of the Emergency National Committee hereinafter described.

B. Executive Committees

Each of the present component associations making up each State Group and any others which may subsequently

be formed within the Motor Vehicle Retailing trade shall set up Executive Committees for the purpose of assisting in administration of the provisions of the Code, to secure adherence thereto, to hear and adjust complaints, to consider proposals for amendments thereof and exceptions thereto, and otherwise to carry out within the component associations by cooperation through the State Advisory Committee the purposes of the National Industrial Recovery Act as set forth in this Code. Any decision of the Committee shall be subject to final appeal to the Administrator. No inequitable restrictions upon membership in any such association shall at any time be imposed.

Article VI—Emergency National Committee

A. Representation

There shall be an Emergency National Committee of the Motor Vehicle Retailing Trade composed of the Chairman of each State Advisory Committee and five additional members, who shall be members of some State Advisory Committee, elected at large by the exclusive or independent used car dealers.

"Provided, however, that if any State Advisory Committee shall not have been duly constituted, or any Chairman of any State Advisory Committee shall not have been duly selected on April 30, 1934, or if any of the aforesaid five additional members shall not have been duly selected on such date, such of the Chairmen of the State Advisory Committees and of the five additional members as have been duly selected on said date, shall constitute an Acting Emergency National Committee, pending due selection of the remaining chairmen of State Advisory Committees and additional members. Such Acting Emergency National Committee shall be in power to exercise the powers and shall be subject to the duties herein set forth for the Emergency National Committee."

B. Powers

The Emergency National Committee shall be the general planning and coordinating agency for the industry. Its members selected as aforesaid shall be empowered to act

for their respective State Advisory Committees conclusively in respect to all matters before the National Committee for consideration and within its jurisdiction. The Chairman of the Emergency National Committee shall appoint fourteen members, three of whom shall be exclusive used car dealers to be called the Administrative Committee. Such appointments are to be approved by a majority of the members of the Emergency National Committee, and to insure balaneed representation of all classes of dealers must [fol. 36] include dealers from smaller towns, and dealers geographically representative of the Nation, as well as the various lines of cars and with consideration of the appointee's availability and willingness to serve.

The Emergency National Committee shall delegate its power to the smaller body to be exercised as necessary to problems requiring attention between meetings of the National body.

The Emergency National Committee shall have powers and duties as provided herein, and in addition thereto it shall,

(1) From time to time require such reports from state associations and component association, or from local associations, or from individual dealers, as in its judgment, subject to the approval of the Administrator, may be necessary to advise it adequately of the administration and enforcement of the provisions of this code:

(2) Upon complaint of interested parties or upon its own initiative make such inquiry and investigation into the operation of the Code as may be necessary, and report its findings to the Administrator, and

(3) Make rules and regulations necessary for financing the administration and enforcement of this Code, subject to the approval of the Administrator. The Committee may delegate any of its authority to the National Control Committee hereinafter provided and may designate such agents as it shall determine.

Article VII—Statistics

The National Automobile Dealers Association will serve as a medium through which all required statistics will be obtained, and each member of the Code shall upon request furnish it with a sworn statement of such information and

make his books available to the National Automobile Dealers Association, to the end that the terms of this Code regarding increase of wages, shortening of hours, and the establishment of fair used-car allowance, based upon all actual sales and the maintenance of established prices, may constantly be available to the Administrator.

Article VIII—National Control Committee

The Emergency National Committee of the motor vehicle retailing trade shall appoint from its own membership a National Control Committee of 4 members, 1 of whom shall be an exclusive used-car dealer. In addition, there may be two non-voting members appointed by the Administrator. The National Control Committee shall exercise such authority as may be delegated to it by the said Emergency National Committee. All communications and conferences of the motor vehicle retailing trade with the President or with his agents concerning the approval or amendment of this Code or of any of its provisions or any matters relating thereto, shall be through the said National Control Committee The National Control Committee shall serve as an executive agency for the Emergency National Committee of the motor vehicle retailing trade and shall be charged with the execution of the duties, through agents or otherwise, of hearing and adjusting complaints, considering proposals for amendments and making recommendations thereon, approving recommendations, for exceptions to the provisions of this Code, and otherwise administering its provisions. Any member of this Trade shall have the right [fol. 37] of appeal to the Emergency National Committee from decisions of the National Control Committee and the decisions of the said Emergency National Committee may be appealed from, to the Administrator whose decision will be final. The function of this committee shall be the general planning and coordinating for the motor vehicle retail trade and the cooperation with similar boards of the National Automobile Chamber of Commerce and other branches of the industry to the end of effecting a balanced national economy.

Article IX—General

(1) No provision in this Code shall be interpreted or applied in such manner as to:

(a) Promote monopolies
(b) Permit or encourage unfair competition
(c) Eliminate or oppress enterprises, or
(d) Discriminate against small enterprises.

(2) This Code is hereby expressly made subject to the right of the President, pursuant to Section 10 (b) of the National Industrial Recovery Act, from time to time, to cancel or modify any order, approval, license, rule, or regulation issued under Title I of said Act, and particularly, but without limitations, to cancel or modify his approval of this Code or any condition imposed by him upon such approval.

(3) The Emergency National Committee of the motor vehicle retailing trade and the National Control Committee shall from time to time make to the Administrator such recommendations, including amendments of the Code, as in their judgment will aid the effective administration of this Code, or may be necessary to effectuate within the motor vehicle retailing trade or within any subdivision thereof for which the purpose of the Act is administered.

(4) Such of the provisions of this Code as are not required to be included therein by the Act, may, with the approval of the President, be modified or eliminated as changes in circumstances or experience may indicate. It is contemplated that from time to time supplementary provisions to this Code or Codes, including in particular, but without limitations, supplementary provisions relating to dealers engaged exclusively in servicing or repairing, will be submitted for the approval of the President to prevent urfair competition in price and other unfair and destructive competitive practices and to effectuate the other purposes and policies of Title I of the Act consistent with the provisions thereof.

(5) Violation by any dealer of the motor vehicle retailing trade or any provisions of this Code, or of any approved rule issued thereunder, is an unfair method of competition.

(6) If any employer in this industry is also an employer in any other industry, the provisions of this Code shall apply to and affect only that part of the business of such employer which is a part of the trade covered by this Code.

(7) This Code shall become effective upon its approval by the President, except as herein specifically provided.

Approved Code No. 46.
Registry No. 1403-32.

[fol. 38] EXHIBIT "B" TO BILL OF COMPLAINT

Laws of 1933, Chapter 781

(Effective—August 26, 1933)

Purpose

An Act to provide for codes of fair competition for trades, industries and subdivisions thereof. Agreements, licenses, rules and regulations pursuant to the provisions of the National Industrial Recovery Act, enacted by the congress of the United States effective June sixteenth, nineteen hundred thirty-three, as affecting intrastate commerce within the state

Became a law August 26, 1933, with the approval of the Governor. Passed, on message of necessity, three fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative finding; statement of policy.—A national emergency productive of widespread unemployment and disorganization of industry, which likewise prevails in the state of New York, which burdens intrastate, interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people and of the people of the state of New York, is hereby declared to exist. The existence in this state of such present acute economic emergency, and the effects and certain causes thereof as declared in section one of title one of the national industrial recovery act, enacted by the congress of the United States, effective June sixteenth, nineteen hundred and thirty-three, are hereby recognized; and it is hereby declared that said emergency, the causes and effects thereof, as so declared, relate as well to commerce in this

state wholly intrastate in character as to interstate and foreign commerce and transactions affecting interstate and foreign commerce carried on in this state. It is hereby declared to be the policy of this state to cooperate in the furtherance of the objects and purposes declared in said act of the congress, and each and every provision of this act shall be construed in accordance with the policy so declared, and to make uniform the standards of fair competition prevailing in intrastate commerce and industry with those of interstate commerce required by the provisions of the said national industrial recovery act which are applicable in interstate commerce in the state of New York.

[fol. 39] S. 2. Filing of Codes and Agreements.—1. The Secretary of State is hereby authorized to receive for filing and shall file in the office of the department of state a copy of each code, agreement, license, rule or regulation in effect pursuant to such act of the congress, pertaining, affecting or in any way relating to the conduct of business in the state and duly certified as a true copy of such document or documents by the officials in charge of the administration of the provisions of title one of the said national industrial recovery act or by their duly authorized agents. Upon such filing of a copy so certified of a code of fair competition for any trade, industry or subdivision thereof, as approved by the President of the United States, or of any agreement or license or of any rule or regulation provided for under title one of the said National Industrial Recovery Act, such code, agreement, license, rule or regulation shall be the standard of fair competition for such trade or industry or subdivision thereof in the state as to transactions intrastate in character, and any violation of any provision of such code, agreement, license, rule or regulation shall be a misdemeanor, and upon conviction thereof, the person convicted shall be fined not more than five hundred dollars for each offense, and for each day such violation continues a separate offense subject to the fine herein prescribed shall be deemed to have been committed.

2. The Secretary of State shall cause to be printed a sufficient number of copies of each such code, agreement, license, rule or regulation and the same shall be kept available for distribution upon request therefor.

3. If in any such code, agreement, license, rule or regula-

tion, power is conferred upon any person or group of persons to subpœna witnesses, compel the production of books, papers and records, the attendance of witnesses or to take their testimony, a like power shall be deemed to have vested in such person or group of persons with regard to matters and things of a wholly intrastate character.

S. 3. Jurisdiction of Court.—The Supreme Court of the State of New York is hereby invested with jurisdiction to prevent and restrain violations of any code of fair competition, agreement, license, rule or regulation, filed pursuant to this act, and to prevent and restrain the commission within this state of any act tending to defeat or hamper the operation and effectiveness, within the state, of such act of the congress at the instance of any party whose interests are or may be adversely affected by such violations or acts. Nothing in this section contained, however, shall in any wise affect the criminal liability for violations of such codes, agreements, licenses, rules or regulations. Provided, however, that nothing in this act shall be con- [fol. 40] strued by any public official or court as declaring illegal the right of workers to organize; to adopt a constitution and by-laws and enforce the same and the right to control and direct the members of such organization in accordance with such constitution and by-laws; that no provisions of this action shall be construed with such constitution and by-laws; that no provision of this Act shall be construed to compel workers or employees to continue at their work; or to declare an act illegal of an organization to collectively cease work; or its officers directing the cessation of work of its members.

S. 4. Products of Individual Labor.—Nothing in this act shall prevent an individual from pursuing the vocation of manual labor and selling or trading the products thereof; nor shall anything in this act prevent anyone from marketing or trading the produce of his farm.

S. 5. Exemption from Anti-Trust Laws; Application of Labor Laws.—While this act is in effect and for sixty days thereafter, any code, agreement, license, rule or regulation in effect under this act, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of article twenty-two of the general business law, or of any other provisions of law, to the

extent that such provisions of law are inconsistent with the provisions of such code, agreement, license, rule or regulation. Nothing in this act contained, however, shall be construed in any way to alter, modify or affect the provisions of existing laws of this state in such manner as to permit any change in public utility rates except with the permission and approval of the public service commission or as to lower the standards therein provided with regard to labor, hours of labor, wages for labor and employment of females and children.

S. 6. Effect of the Issuance, Suspension or Revocation of Licenses.—1. The license required of and obtained by any person pursuant to paragraph (b) of section four of said act of the congress shall be deemed to include business engaged in or carried on by him of a wholly intrastate character, and with respect thereto such person shall be subject to all the terms and conditions expressed therein and shall be entitled to all the privileges and immunities granted thereby.

2. The failure to obtain such a license or the suspension or revocation by the President of the United States of any such license shall preclude such person from engaging in or carrying on any business of a wholly intrastate character.

[fol. 41] 3. Any person who engages in or carries on any business in this state in violation of subdivision two of this section shall, upon conviction thereof, be fined not more than five hundred dollars and for each day such violation continues a separate offense, subject to the fine herein prescribed shall be deemed to have been committed.

Sec. 7. Letting of Public Contracts.—Every department, board, bureau, agency, authority, commission, public body or officer of the state or of any political subdivision thereof or district therein charged with the duty of letting or awarding contracts for (a) the construction, alteration, or repair of public works or (b) the purchasing of materials or supplies, shall, notwithstanding any inconsistent provision of law, let or award such contracts only to such persons or corporations, otherwise qualified, who or which will agree in and by the terms of such contract to use or supply only articles, materials and supplies which have been or will be mined, produced, manufactured or supplied, as the

case may be, by a person or corporation who or which is a party or subject to a code of fair competition, agreement or license, approved, prescribed or issued under the said national industrial recovery act for the trade, industry or subdivision thereof mining, producing, manufacturing or supplying such articles, materials or supplies.

S. 8. Duration.—This act, in so far as it affects agreement, codes, rules or regulations, shall become ineffective contemporaneously with the expiration of said national industrial recovery act, provided for by section two (c) of said act, and in so far as it affects licenses, contemporaneously with the expiration of the said National Industrial Recovery Act, as provided for in section four (b) of said act.

S. 9. Effect of Partial Invalidity.—If any provision of this act or the application thereof to any person or circumstance is held invalid, the remainder of this act, and the application of the provisions thereof to other persons or circumstances, shall not be affected thereby.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF DAVID SPIELMAN

STATE OF NEW YORK,
County of New York, ss:

David Spielman, being duly sworn, deposes and says:

I am the President of the Spielman Motor Sales Co. Inc., the complainant herein, and also president of the Spielman Chevrolet Corporation, an associate company.

Both Spielman Motor Sales Co. Inc. and its affiliate, Spielman Chevrolet Corporation, have been duly incorporated under and by virtue of the Laws of the State of New York.

Ever since the year 1933, the Spielman Motor Sales Co. Inc., has been engaged in the business and trade of buying and selling motor vehicles, motor vehicle parts and accessories, and the general service and repair of motor vehicles. The character of the business of the complainant

brings it within the definition of the term "dealer", as defined in Article II of the Code of Fair Competition for [fol. 43] the Motor Vehicle Retailing Trade.

The Spielman Motor Sales Co. Inc., is a duly authorized retail agency of the Chevrolet Motor Company, selling Chevrolet motor cars, popularly characterized as "low priced" cars.

The Spielman Motor Sales Co. Inc. and its affiliate, conduct places of business, at the following addresses:

220 Greenpoint Avenue, Borough of Brooklyn, City of New York.

379 Broadway, Borough of Brooklyn, City of New York.

Union and Montrose Avenues, Borough of Brooklyn, City of New York.

185 Canal Street, Borough of Manhattan, City of New York.

250 Hudson Street, Borough of Manhattan, City of New York.

The complainant and its affiliated company is the largest Chevrolet agency in the entire metropolitan area of New York City, and conducting, as it does, all of its business within the territorial confines of the State of New York, has ascended to prestige, being one of the largest automobile dealers in the East. It employs in excess of eighty persons, and in the year 1933, its annual gross sales exceeded One Million Dollars. Large sums of money have been invested and expended in both physical assets and in the establishment and retention of the intangible good will of such organizations. These vast expenditures have developed a patronage amongst its customers of immeasurable monetary value.

[fol. 44] The President of the United States on June 16th, 1933, signed the National Industrial Recovery Act, and in pursuance thereof, on October 3rd, 1933, he did approve the Code of Fair Competition for the Motor Vehicle Retailing Trade.

The prime object of both this enactment and of the Code, was to reemploy more people at a fair wage.

Spielman Motor Sales Co. Inc. and its affiliate, have enthusiastically cooperated in attaining the sought for objective. Both its weekly payroll and the number of employees increased more than 50%, without any substantial increase in sales. As a matter of fact, complainant and its

affiliate company, have always paid wages far greater than that paid by the average motor vehicle retail dealer in this area.

The complainant has very assiduously adhered to every phase of the said Code of Fair Competition with respect to its labor provisions, and despite the aggressive efforts, as will hereafter be described in full, the Local Administrator of the aforementioned Code of Fair Competition, has been unable to charge the complainant with any deviation from such regulations.

Complainant and its officers wholeheartedly endorse the benefits that are clearly derived from such salutary labor provisions of the Code, and have unqualifiedly adhered to such provisions.

[fol. 45] This application is presently made to determine the validity, as laws of the State of New York, of certain "fair trade practice provisions" of the said Code of Fair Competition.

The enforcement of such "fair trade practice provisions" has occasioned great loss to the complainant, and if such provisions are to be enforced, will occasion further additional loss, as to effectually force the complainant out of business.

Basically, such grievous provisions are "price fixing" instrumentalities. Permit me to discuss this problem in greater detail.

Sales of new automobiles are consummated basically in two different ways.

The first is the outright sale of a new automobile, for a fixed price. This price is paid either in cash or amortized by payments over a period of time.

The second is what is known as a "trade in" sale. A price is established for the car to be sold, and the consideration for such car is made up in part by the delivery of the purchaser's old car. The balance of the consideration is paid in cash, either outright or amortized over a period of time.

The first contemplates an outright sale. The second contemplates part barter and part sale.

[fol. 46] The experience in recent years of the complainant and its affiliate company, which I believe to be typical of the rest of the industry, demonstrates that approximately 85% of the automobiles sold, is through the second method above described, known as a "trade in" sale.

The Code of Fair Competition for the Motor Vehicle Retailing Trade, under Article IV, Subsection A, establishes the method through which maximum prices are fixed for used car allowances in the purchase of new automobiles.

While theoretically, this establishes but a maximum price that a dealer may allow for any particular model of automobile, for all practical purposes, such maximum has become the price for all automobiles of the said model.

Inasmuch as more than 85% of all transactions contemplate a "trade in", the fixing of an arbitrary price for such "trade in", serves to effectually fix the basis of the transaction, and consequently the price for the new car purchased.

The grievance of the complainant lies basically in the inequality and inequities arising out of such arbitrary price regulation.

[fol. 47] Code Provisions Relative to Price Fixing and Their Operation

Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade, reads as follows:

Article IV—Trade Regulations

The provisions of this section will cover the following products: passenger cars, trucks and commercial vehicles with bodies of ¾ ton capacity and less, or such other capacity limitation as may be deemed proper by the administrator.

A. Used Car Allowance

In an effort to prevent sales below cost, heretofore due to unfair competition that has resulted in the dissipation of the large part of the capital originally in this trade and has accumulated large losses since 1926, this trade agrees to regulate itself so as to return profit possibilities and support increased wages and shortened hours.

Giving consideration to the public interest and to prevent sales below cost, it is hereby provided:

(1) That the value of any model of used motor vehicle, either passenger or commercial, shall be the average price that the public in any given market area is then paying for

such vehicle as ascertained by the Association from sworn statements of all actual retail sales to consumers, subject to the approval of the Administrator. The Association shall publish the average prices thus ascertained approximately every 60 days. In order to insure fair average value in the interest of the consumer, published averages shall be computed for the preceding period and there shall not be included in computing such average that 20% of sales which represented the lowest sales of all actual sales reported in the previous period.

(2) That no dealer shall, directly or indirectly, or by subterfuge, accept in trade any used vehicle at an allowance price of more than its value as ascertained in paragraph (1) above, less a minimum selling, handling, and reconditioning charge, according to the following schedule:
[fol. 48] (a) Five per cent of the allowance price as determined in paragraph (1) above, on (x) the current series model, or (y) the preceding series model.

(b) Ten percent of the allowance price as determined in paragraph (1) above on the model preceding, the two models described in paragraph (2) sub-section (a) above, namely (x) and (y).

(c) Fifteen percent of the allowance price as determined in paragraph (1) above, on all models other than the three models described in sub-sections (a) and (b) above.

(3) To provide a record for the establishment of used car allowances in paragraph (1) above, there shall be provided in each logical trading area of the United States an Official Guide, which shall be provided by the Association which shall be known as the Association Official Guide and shall be recognized as the authority for such allowances, and which shall be based upon actual sales in each trading area for the period of approximately sixty days preceding the date on which the compilation of the official guide is started, as hereinabove provided.

(4) There shall be used as a basis of establishing allowance values, as provided in paragraphs (1) and (2), above, the principle of averaging actual sales at retail to consumer for the preceding period. Since this will, in isolated instances, by reason of very few or no sales on particular models, leave a need to establish a guide figure on such

models, the following method of determining the allowance values will be pursued for the public protection, namely:

(a) If any model of motor vehicle described in the Official Guide shows five or more sales at retail to consumer within the district in any period, then the average figure published becomes the maximum allowance for the ensuing period.

(b) If any model of motor vehicle has less than five sales at retail to consumer within the district for the period then the new car dealers handling this particular make car within this district shall establish its allowance value, the same to be so published in the report. These figures to be subject to approval of the Advisory State Committee and the Administrator.

(c) If any make or model of motor vehicle is not represented in the district or is no longer manufactured and less than five sales at retail to consumer are reported on each or any model of such car, then the Advisory State Committee, subject to the approval of the Administrator, will set the figure based on what like models of other makes sell for in the district.

[fol. 49] (5) No retailer shall use advertising, whether printed, radio, display, or any other nature, which is inaccurate in any material particular or misrepresents merchandise (including its use, trade mark, grade, quality, quantity, size, origin, material, content, or preparation or credit terms, values, policies, or services; and no retailer shall use advertising and/or selling methods which tend to deceive or mislead the customer.

(6) No retailer shall use advertising which refers inaccurately in any material particular to any competitor or his merchandise, prices, values, credit terms, policies, or services.

Fair trade practice rules for other products of this Code will be covered in the Supplemental Code of Fair Trade Practices to be submitted.

B. Marketing Rules

The following Marketing Rules shall take effect 30 days after the approval by the President:

(1) No dealer shall sell a new car at retail to a consumer for less than factory list prices, plus an amount equal to—

(a) Equipment at listed prices.

(b) All taxes paid by dealer applicable to the motor vehicle sold.

(c) Average cost of transportation from factory of said dealer or shipments received by said dealer during a 60-day period as shown by sworn statement of said dealer.

(d) Dealer's actual cost of handling (including such items as (w) unloading, (x) assembling, (y) conditioning for delivery, and (z) interest actually paid by said dealer, but not to exceed 90 days on cost of transportation).

The only exceptions to these prices shall be sales to proprietors' immediate families or members of his organization when for the personal use of such buyer. Motor vehicles sold to employees for use in their employer's business as demonstrators or executives' cars, and cars used as demonstrators by dealer, must be so registered with their trade association, or with the State Advisory Committee; demonstrators' and executive cars shall not be sold to a consumer at retail for less than the full retail price except when they have been in use for a period of at least 60 days from the date of registration, as aforesaid, and [fol. 50] have had at least 3,500 miles actual road usage, or when the manufacturer has made public announcement of a change in model.

(2) No dealer or representative shall offer or give any discount, gratuity, commission, service, or accessory, to a customer or his agent, for the purpose of inducing the customer or his agent to purchase a car. Nothing herein shall prevent conduct pursuant to any warranty of the manufacturer.

(3) Charges for financing retail conditional sales shall be upon an equitable basis to consumer and dealer. No dealer in financing conditional retail sales shall charge a lower rate than the lowest or a higher rate than the highest rate charged by regularly established finance companies operating in the same district as the dealer.

(4) With the approval of the State Advisory Committee and the manufacturer concerned, a dealer will be permitted to sell and offer for sale, new cars that have been discontinued or are about to be discontinued at less than delivered

prices as described in the first paragraph of this section. The intent of this provision is to enable dealers to dispose of their own or their factories' stock. In the event that approval is refused, or that no action is taken within 10 days by the said Committee or the manufacturer, said dealer shall have right of appeal to the Administrator, whose decision shall be final.

(5) With the approval of the State Advisory Committee and the manufacturer concerned, the dealer may sell or offer for sale, any open type of new car at less than delivered price, as described in the first paragraph of this section, provided the dealer will present a sworn statement showing that such car has been included in said dealer's inventory for a period of not less than 45 days. The intent of this provision is to enable a dealer to dispose of a type of car which is or may shortly become difficult to sell because of a change in seasons. In the event that approval is refused or that no action is taken within 10 days by the said committee or the manufacturer, said dealer shall have right of appeal to the Administrator, whose decision shall be final.

[fol. 51] (6) It shall be an unfair trade practice for any new car dealer or representative to sell or permit to be sold any new motor vehicle for resale in a territory already enfranchised for that make of motor vehicle except through a regularly enfranchised dealer in that territory and it shall also be an unfair trade practice for any dealer to purchase a vehicle as above prohibited.

(7) The retail list price for parts, accessories, and supplies will be the manufacturers' published list price adjusted to include all taxes. It shall be an unfair trade practice for any dealer to sell such parts, accessories, and supplies at other than retail list price, except to duly authorized dealers, associate or sub-dealers, or established service stations, operating under any NRA Code.

(8) A dealer shall on delivery of a new car from the manufacturer, inspect and ascertain that the speedometer on the new car is connected before using the car for any purpose. A dealer shall not disconnect the speedometer or permit it to be disconnected. The purpose of this provision is to insure the customer having full knowledge of the mileage

traveled by the motor vehicle which is offered for retail sale.

C. Trade Practice Rules

The Emergency National Committee shall hold a trade practice conference as often as may be necessary for the purpose of making recommendations to the Administrator in regard to the establishment and amending of rules of fair trade practice for the Trade."

Pursuant to this provision, the National Automobile Dealers Association, was empowered to collate all of the used car sales through reports, and to establish an average used car price after having eliminated the margin of 20% of lowest priced automobiles. This average then became the maximum price at which any dealer could accept a similar model of automobile for trade in purposes.

[fol. 52] This very provision, without an examination of the provisions in actual operation, discloses the fallacy of its calculations.

If the average so established, is truly an average, it must contemplate automobiles of value greater than the average and lower than the average, in order to establish such an average. To then take this average and to establish it as the maximum trade in allowance, is to deny to the prospective purchaser of an automobile, who has a used car to trade in that would normally be in the upper brackets in establishing the average, the true value of his automobile.

In other words, since the average of used car sales in the preceding sixty day period becomes the maximum permitted as a trade in allowance, a definite price is fixed on all cars of a particular model, of greater value than the average, but through the ingenuity of this method of calculation, the prospective purchaser is denied the true value of his automobile, but is arbitrarily forced to accept the average established by the sale of a number of automobiles. The converse, however, is not true. Theoretically at least, the prospective purchaser who has an automobile worth less than the average receives a price higher than the actual worth of his automobile, by reason of the fact that the maximum as fixed, has in reality become a minimum, and dealers quote the maximum for the value of a car less than the average, at a decided loss to the dealer.

[fol. 53] In other words, this provision foists upon the purchasing public, a very unfair burden. A prospective purchaser, whose car was worth less than the average, received the higher value for his car. The prospective purchaser whose car was worth more than the average, received but the average, or a price substantially less than the true value of his trade in.

Just as unsound and unreasonable as is this method of price fixing in theory, so too did it work in actual practice.

First and foremost, while the Code of Fair Competition called for the establishment of an average based upon actual used car sales, those in charge of the National Automobile Dealers Association, the official reporting agency, sought to fix the arbitrary prices that the officials of such Association had in mind, irrespective of the reported sales. Without foundation in reason or cause, the National Automobile Dealers' Association returned used car sales reports, duly authenticated, to dealers throughout the nation, and advised them that such reports would not at all be considered in establishing an average.

On November 29th, 1933, the complainant herein received from the said National Automobile Dealers Association, twenty four used car sales reports, with a mimeographed form letter that read as follows:

[fol. 54] National Automobile Dealers Association

1010 Pine St., St. Louis, Mo.

Nov. 27, 1933.

Spielman Motor Sales Co., Brooklyn, N. Y.

Dear Sir:

We are returning September Sales Report received from you. We are rejecting this sale from our compilation for the reason that the net sales price reported is obviously inflated and incorrect, or represents a "junk" sale and to include it in our report would distort average sales prices.

May we urge upon you the absolute importance of supplying accurate sales figures.

Yours very truly, National Automobile Dealers Ass'n, Statistical Department. NEB.—EM.

It is quite obvious from the examination of this letter, that many general reasons had been assigned, ranging from

inflated and incorrect prices, to the other extreme of junk sales.

It is to be noted that the form of this letter makes reference to "junk" sales as a reason for rejecting such used car sales reports. As a matter of fact, such "junk" sales [fol. 55] were to be reported because the method of calculation specifically provided for the elimination of the marginal 20% of used car sales, upon the theory that such sales might in fact reflect "junk" sales.

It is to be particularly noted that no assertion of truth, with respect to the statements made in the letter, have any support in facts, whatsoever.

Such reports did not meet with the whim and fancy of the officers of this Association and were therefore rejected.

We can come to but one conclusion and that is that the officers of this Association definitely established what values were to be fixed and then used such reports as would be necessary to arrive at such conclusion. All other reports were necessarily rejected.

The officers of the National Automobile Dealers Association were eager to make large and handsome profits for their constituents, the result of which was the fixation in most instances, of low and insufficient "maximum prices" for used car allowances. Unquestionably, they must have determined that such low maximums would afford their member dealers an opportunity to resell such trade-in cars at a substantial profit.

This avarice and greed is more responsible for the entire collapse of code adherence and enforcement than any other factor.

[fol. 56] The experience of my organization and its affiliate, is typical of every other dealer that sought to comply with the provisions of the Code. Customers of long standing sought to complete transactions, but found that the maximum price fixed was so far under the true value of the car sought to be traded in, that such a patron either abandoned the thought of making a purchase, or sought out some dealer that was not as scrupulous, and who was willing to pay a true value for such a trade in.

I have personally contacted many men engaged in business, with a reputation over a period of a generation, of being good, substantial and law abiding citizens, walk out of our establishment with the expression, they regretted

that they could not do business with Spielman Motor Sales Co. Inc., but that they were compelled to ferret out some dealer who was not as meticulous about Code adherence, as the complainant.

Annexed hereto and made part of this application, are a series of affidavits of reputable dealers of motor cars in metropolitan New York, whose experiences parallel that of the complainant. It is significant to note, however, that the dealers whose affidavits are annexed, are not exclusively Chevrolet dealers, but are dealers of other makes of automobiles, other than Chevrolet.

[fol. 57] The irony of the situation is impressive. Honest men seeking out law violators, so that they might in fact, receive an honest and true value for their property. Think of it, honest business men, urging other men and institutions, to flaunt the law, so that a transaction involving the honest exchange of value might be truly consummated.

By actual tabulation, the complainant has actually lost between 170 and 180 sales of automobiles, which were later consummated by other dealers at prices prohibited by code regulation, the loss to the complainant in dollar volume being well in excess of $100,000.00 in sales.

This experience was not novel. The very administrator of the State Advisory Committee of the Motor Vehicle Retailing Code, Mr. John B. Hulett, told me in a person to person conversation, that his records indicated over 1200 complaints on violations in the metropolitan area of New York. It is reasonable to assume that not all trades that were consummated contrary to the code, were reported, and that in fact, perhaps ten times that number would more truly reflect the actual conditions.

In view of the fact that there are less than one thousand dealers in this metropolitan area, it is conservative to say that violation of the code is predominant and adherence rare.

[fol. 58] Such a wholesale flaunting of the laws by both seller and purchaser alike, is not typical usually of the citizenry of this nation. There is something basically unsound, something basically inequitable in the rules that are sought to be enforced, that has resulted in such a complete collapse of this price structure. The answer is simple. The first law of nature is self preservation. Every purchaser seeks a reasonable and true value for his property. When he finds

that one dealer will not afford him such, he finds another, irrespective of code provisions.

Perhaps foolishly, in face of wide-spread violation, complainant has rigidly adhered to the provisions of the Code, though I, representing the complainant, have from the very inception of the Code, at every trade meeting and in the forms of letters that will be adduced on the argument of this application, vehemently protested the unfairness of such code provisions, strenuously asserting the fundamental difficulty of its enforcement—because it was basically unsound, because it did not truly afford the patron a true and honest value for his property.

Such honest expression of opinion earned for the complainant, the unmitigated wrath of the local enforcing agency, the Motor Vehicle Retailing Code Administration of Metropolitan New York Inc. Every conceivable method that the administrator himself could contrive, was employed. First persuasion, then threats, then boycott, then entrappment, and finally, attempted criminal prosecution. [fol. 59] Methods in one extreme, of employing the planting of dictaphones in private homes for the purpose of aiding entrappment, to the other extreme of sending emissaries promising abandonment of criminal prosecutions, in return for an admission of non-compliance, have been utilized.

Almost every sale of a new automobile of the complainant, was pursued by Mr. Hulett, who terms himself as the Local Administrator of this Code. Customers were sent questionnaires to be filled in by them, with respect to their purchase of new automobiles from the complainant. Threats and intimidation were employed against such customers, who refused to answer the questionnaires or submit affidavits of their purchases.

I will submit to this Court in due time, affidavits of such customers, showing the methods employed to harass and annoy the complainant herein, by reason of the stand taken by it to safeguard its business and its constitutional rights. Such methods as have been employed by the Motor Vehicle Retailing Code Administration of Metropolitan New York, Inc., are repulsive and repugnant to both man and governmental agency alike, and in a democratic government, should be looked upon with a disdain of the despised.

Violations of the provisions of Article IV of the Code of

Fair Competition for the Motor Vehicle Retailing Code, are rampant and wholesale, is well known in the trade, as is attested by the annexed affidavits of several of the dealers [fol. 60] and by the admissions of the administrator himself, for sales are either consummated in either wilful disregard of the provisions of the said Article IV, or by numerous and divers subterfuges.

Not only has there been an actual fixation of price for a trade in used car, but by the provisions of Article IV, Subdivision B, Paragraph (2) of the said Code, no dealer or representative of a dealer is permitted to allow any discount, commission or other inducement to a customer or his agent, for the purpose of inducing the purchase of a new automobile. This is but another method of establishing and maintaining fixed prices in the sale of cars. Such provision has become an added hindrance to the complainant, in the consummation of sales of new automobiles.

Prior to the adoption of the Code, it was the common and adopted practice of all automobile dealers, and recognized by manufacturers, to allow to large fleet owners, a special discount of 10% on the purchase of a fleet of automobiles. As a matter of fact, in addition to the usual 10% discount given by dealers, the manufacturer would give an overriding discount based upon the volume of business obtained from the particular fleet owner. This practice is apparently now restrained and prohibited by the Code, causing the complainant the further loss of sales to fleet owners, who are reluctant to purchase entire fleets, without any advantage to them by reason of such wholesale purchase.

[fol. 61] The experience of complainant shows that the large fleet owners retain their used motor vehicles wherever possible and recondition them for further use, instead of purchasing a new fleet, for there is no added inducement to fleet owners to trade all their used cars and purchase new fleets, without the former 10% discount. In fact, some fleet owners are limiting their purchases to bare necessities. Where a used car cannot possibly be reconditioned or repaired, and is beyond such repair, then and then only are they turning towards the purchase of new cars.

In one particular instance, the complainant herein contracted for the sale of twelve sedan Chevrolet automobiles, six for immediate delivery and six for future delivery. This contract was entered into prior to the adoption of the Code. The six cars for immedite delivery were de-

livered to the customer, but the administrator refused to permit the complainant herein to deliver the remaining six cars after the adoption of the Code, by reason of the fact that the contract although entered into prior to the adoption of the Code, called for the usual 10% discount to the fleet owner.

In still another transaction, wherein five business coupes were involved, the order therefor was taken prior to the adoption of the Code, for immediate delivery. However, the models were produced after the Code. Still again, the administrator refused to permit the complainant to allow the usual 10% discount, although as in this instance, the [fol. 62] contract was entered into prior to the adoption of the Code.

To set forth at length and in detail, each and every obstacle that has been cast in the way of complainant while doing a legitimate business, by reason of the provisions of Article IV of the Code, would be to unduly burden the Court and unduly lengthen this affidavit.

The past experience of the complainant herein under this Code, compels the complainant to commence this action, for the further compulsion of compliance with these price fixing provisions of Article IV, will cause the complainant herein considerable and inestimable loss in in further sales, as to seriously threaten complainant's further continuance in business.

I respectfully submit that the ascertained prices upon the so-called average basis, as set forth in the Official Guide Book, compiled by the National Automobile Dealers Association, a membership corporation of the State of Illinois, and having the apparent sanction of law, are unfair, unreasonable, arbitrary, oppressive and inequitable, and if the complainant corporation herein is further compelled to adhered to the provisions of Article IV and the prices fixed and established in the Official Guide Book, it cannot continue in its lawful business and will thereby be deprives of its rights and property, without due process of law.

[fol. 63] The aid of a Court of equity is necessary, so that the constitutional rights of the complainant shall not be impaired. That its rights to continue in its lawful business should not be hindered by such laws and provisions as hereinabove enumerated.

That in the event that complainant refuses to abide by the provisions of Article IV of the Code of Fair Compe-

tition for the Motor Vehicle Retailing Trade, it is subject to the severe penalties to be inflicted upon it by virtue of the provisions of Chapter 781 of the Laws of 1933, at the rate of $500.00 per day for each continued violation.

If the complainant continues to comply with the provisions of Article IV of the said Code, it is being deprived of an inestimable amount of sales, as has been experienced since the adoption of the Code, or in the alternative, the infliction of severe penalties upon it, in the event of violation thereof.

In either even, it is and will be deprived of its property and lawful business, without due process of law, and as I have been advised, in derogation of complainant's inalienable rights accured to it by the respective Constitutions of the United States of America, the State of New York, and the several amendments thereto.

The defendant herein is the duly elected District Attor- [fol: 64] ney of the County of New York, who, by virtue of the several laws of the State of New York, more particularly Chapter 781 of the Laws of 1933, is required and compelled to prosecute all violations of law and public offenses, and to conduct such prosecutions for such violations of law in the name of the People of the State of New York.

That by virtue of the filing of a certified copy of the Code of Fair Competition for the Motor Vehicle Retailing Trade, on the 5th day of December, 1933, in the office of the Secretary of State of the State of New York, the said Code of Fair Competition for the Motor Vehicle Retailing Trade, has the apparent sanction of law of the State of New York, and it is likewise encumbent upon the defendant, in his official capacity as such District Attorney, to prosecute any violations of any of the provisions of the said Code of Fair Competition for the Motor Vehicle Retailing Trade.

On the 3rd day of July, 1934, at the special instance and request of the Motor Vehicle Retailing Code Administration Metropolitan New York, Inc., upon the suggestion and instigation of the State Advisory Committee of the Motor Vehicle Retailing Code, an enforcement unit of the provisions of the said Motor Vehicle Retailing Code, one Harold H. Straus, was specially deputized by the defendant herein, as a special assistant district attorney for the County of New York, and was sworn in as such special

assistant district attorney by Otto H. Rosalsky, a Judge [fol. 65] of General Sessions of the State of New York, for the County of New York, and by virtue thereof, invested in accordance with the laws of the State of New York, with the right, power and duty to prosecute in the name of the People of the State of New York, any violations of the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade.

That thereafter and on or about the 7th day of July, 1934, the defendant together with the said Harold H. Straus, special assistant district attorney, announced to the complainant and other motor vehicle dealers, publicly and otherwise, that they were prepared and through the office of the defendant, as District Attorney of the County of New York, State of New York, ready to commence and institute a criminal prosecution against the complainant herein for an alleged violation of the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, more particularly, an alleged violation of the provisions of Article IV of the said Code of Fair Competition, the said defendant and the said Harold H. Straus, acting purportedly under and pursuant to the purported authority of Chapter 781 of the Laws of 1933, of the State of New York.

That in furtherance of the said public and open threat of the defendant and the said Harold H. Straus, on or about the 7th day of July, 1934, an application was made by the defendant and the said Harold H. Straus, as such deputized [fol. 66] assistant district attorney, to one, James G. McDonald, Chief City Magistrate of the City of New York, County of New York, in the name of the People of the State of New York, for the issuance by the said Magistrate, of a summons, directing, compelling and requiring the said complainant herein and two others, to appear before the said City Magistrate, or any City Magistrate holding Court at the City Magistrate's Court at #301 Mott Street, in the Borough of Manhattan, City, County and State of New York, on the 9th day of July, 1934, to the end that an investigation be made of an alleged complaint against the complainant herein, signed and sworn to by one Fred Gross, as complainant, for an alleged purported violation of the provisions of Article IV of the Motor Vehicle Retailing Code, and that upon such investigation, an information be drawn against the complainant herein, for such alleged

violation, and that the complainant herein stand trial upon such alleged charge.

That on the 7th day of July, 1934, a copy of the said summons was personally served upon your deponent, as President of the complainant herein, who, by virtue of the penalties provided in the Code of Criminal Procedure of the State of New York, was compelled to appear before the City Magistrate holding Court at the said City Magistrate's Court on the 9th day of July, 1934, to answer the alleged charge of a violation of the provisions of Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade.

[fol. 67] That the complainant herein duly appeared on the said 9th day of July, 1934, and a continuance of the said hearing and investigation of the complaint was ordered until the 13th day of July, 1934, and on the 13th day of July, 1934, the said hearing and investigation was continued until the 9th day of August, 1934, before the said City Magistrate in the said City Magistrate's Court of the City of New York.

That the defendant and his said special assistant, Harold H. Straus, are and will, unless restrained from so doing by an order of this Court, prepared to institute the said criminal proceedings to enforce the provisions of Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade against the complainant herein, for its purported violation of the said Code, and Article IV thereof, and that if the defendant herein is permitted to pursue the said institution of such criminal proceedings against the complainant, it will suffer irreparable damage, all in deprivation of its rights and property, secured to it by the Constitutions of the State of New York, the United States of America, and the several amendments thereto.

In view of all the foregoing, complainant prays this Court, for an order granting unto the complainant herein, temporarily and pendente lite, the injunctive relief prayed [fol. 68] for in the bill of complaint filed herein.

David Spielman.

Sworn to before me this 1st day of August, 1934. Adele Morse, Notary Public, Kings County. Kings Co. Cl'k No. —, Reg. No. 6180. New York Co. Cl'k No. —, Reg. No. 6M200. Queens Co. Cl'k No. 433, Reg. No. 2308. Commission Expires March 30, 1936.

[fol. 69] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF S. FREDERICK PLACER

STATE OF NEW YORK,
County of New York, ss:

S. Frederick Placer, being duly sworn, deposes and says:

That he is a member of the law firm of Miller, Paul & Placer, the attorneys for the complainant herein, with offices at 276 Fifth Avenue, Borough of Manhattan, City of New York, and that he is duly admitted to practice before this Court.

Your deponent is fully familiar with the facts and pleadings herein.

After a review of the facts and law herein, your deponent has advised the complainant herein that it has a good, sufficient and meritorious cause of action, and entitled to the relief sought in a Court of Equity.

[fol. 70] That no previous application has been made for the relief herein prayed for, to any other Court or Judge.

The reason an order to show cause is prayed for, together with a stay, is to maintain the status quo herein by reason of the fact that the summons issued by the defendant against the complainant herein is returnable before the Magistrate's Court in the City of New York, on the 9th day of August, 1934. In order that the rights of the complainant herein may not be jeopardized by any further actions on the part of the defendant, a stay pending the hearing and determination of this application is respectfully prayed for.

Pursuant to Section 380 of the United States Code, your deponent respectfully requests the convening of a Statutory Court, as provided in the said Section 380, to hear and determine the said application, as it involves the constitutionality of a State law, towit: Chapter 781 of the laws of 1933 of the State of New York.

S. Frederick Placer.

Sworn to before me this 2nd day of August, 1934. Melvin L. Levitt, Notary Public. N. Y. Co. Cl'k No. —, Reg. No. —. My commission expires March 30, 1936. (Seal.)

[fol. 71] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF EDNA S. BURKE

STATE OF NEW YORK,
County of ——, ss:

Edna Sperl Burke, being duly sworn, deposes and says:

I am Secretary of Bushwick Decatur Motor, Inc., a Corporation, engaged in the sale at retail of automobiles and motor vehicles.

I am a duly authorized agent for the sale of Ford automobiles, and have been such for one year.

I am familiar with conditions prevalent in the retail motor vehicle trade, immediately prior to the adoption of the Motor Vehicle Retailing Code, and with the conditions that have arisen subsequent to its approval.

Prior to the adoption of the Motor Vehicle Retailing Code, the retailing of automobiles was subject to no price regulations. A customer was afforded by all dealers in general, a fair and actual value of a used car offered by the customer for trade-in purposes on the purchase of a new automobile.

[fol. 72] With the approval of the Motor Vehicle Retailing Code, including as it does Article IV, a restriction has been placed upon dealers, wherein they are restricted and compelled to pay to prospective purchasers of new automobiles, not the actual, honest and true value of the automobile offered for trade-in purposes on the purchase of a new car, but a price as defined in the said Article IV, not above the "average" price as ascertained.

With this provision, a prospective purchaser having a trade-in used car of more than average value, cannot be allowed more than the "average" price as ascertained.

This has resulted in a refusal of customers to accept the "average" price for their used car for trade-in purposes, where their used cars were better than the "average" price, dmanding the actual fair value of the used car trade-in.

I have been compelled by reason of the Code to lose such sales, for I could not pay unto the prospective customer the actual value of his used car on a trade-in, where the actual value was in fact greater than the "average" price permitted to be paid by the code.

This price regulation and restriction has therefore had a decided unwholesome effect upon my business.

1st. Customers have refused to purchase new cars, where they could not get a fair and actual value for their used car trade-in.

2nd. Where I have refused to pay more than the "Average" price for a more than the average car, I have found customers have consummated purchases of new automobiles and have secured for their used car trade-in from [fol. 73] other dealers, values higher than those set by the Code as the "average" price, in apparent violation of Article IV, Paragraph a, Subdivisions 1 and 2 of the Code.

That dealers are violating the price provisions of the Code, is well known in the trade, for by numerous and divers subterfuges, used car trade-ins are accepted, at prices higher than the "average" prices set by the Code.

Since the approval of this Code, I have lost approximately (75) seventy-five sales, due to the fact that I was restricted from paying more than the "average" price for more than the average cars. This has resulted in the loss to me of several thousands of dollars, due primarily to the price fixing features of the Code.

The further compulsion of compliance with this price fixing provision will cause me further considerable and inestimable loss in sales.

I firmly believe in the principles of the Recovery Movement and have always adhered to the wage and hour provisions of the Code, in an endeavor to aid industrial recovery. However, the price fixing features of Article IV of the Motor Vehicle Retailing Code, are destructive of the fundamental purposes of the Recovery Act, and are retarding any possible progress of the industry, in that they stifle and thwart the purchase of new automobiles when trade-in values are not permitted at actual and true values.

Violations of the Code are prevalent and I believe that the enforceability of the price fixing provisions of the Motor Vehicle Retailing Code, cannot and will not be enforced in the industry.

Edna Sperl Burke.

Sworn to before me this 23rd day of July, 1934.
David Speelman, Notary Public, Kings County.

[fol. 74] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HAROLD PERFIT

STATE OF NEW YORK,
County of Kings, ss:

Harold Perfit, being duly sworn, deposes and says:

I am President of Harper Motors, Inc., a Corporation, engaged in the sale at retail of automobiles and motor vehicles.

I am a duly authorized agent for the sale of Chevrolet automobiles, and have been such for years.

I am familiar with conditions prevalent in the retail motor vehicle trade, immediately prior to the adoption of the Motor Vehicle Retailing Code, and with the conditions that have arisen subsequent to its approval.

Prior to the adoption of the Motor Vehicle Retailing Code, the retailing of automobiles was subject to no price regulations. A customer was afforded by all dealers in general, a fair and actual value of a used car offered by the customer for trade-in purposes on the purchase of a new automobile.

With the approval of the Motor Vehicle Retailing Code, [fol. 75] including as it does Article IV, a restriction has been placed upon dealers, wherein they are restricted and compelled to pay to prospective purchasers of new automobiles, not the actual, honest and true value of the automobile offered for trade-in purposes on the purchase of a new car, but a price as defined in the said Article IV, not above the "average" price as ascertained.

With this provision, a prospective purchaser having a trade-in used car of more than average value, cannot be allowed more than the "average" price as ascertained.

This has resulted in a refusal of customers to accept the "average" price for their used car for trade-in purposes, where their used cars were better than the "average" price, demanding the actual fair value of the used car trade-in.

I have been compelled by reason of the Code to lose such sales, for I could not pay unto the prospective customer the actual value of his used car on a trade-in, where the actual value was in fact greater than the "average" price permitted to be paid by the Code.

This price regulation and restriction has therefore had a decided unwholesome effect upon my business.

1st. Customers have refused to purchase new cars, where they could not get a fair and actual value for their used car trade-in.

2nd. Where I have refused to pay more than the "average" price for a more than the average car, I have found that customers have consummated purchases of new automobiles and have secured for their used car trade-in from other dealers, values higher than those set by the Code as the "average" price, in apparent violation of Article IV, Paragraph a, Subdivisions I and 2 of the Code.

[fol. 76] That dealers are violating the price provisions of the Code, is well known in the trade, for by numerous and divers subterfuges, used car trade-ins are accepted, at prices higher than the "average" prices set by the Code.

Since the approval of this Code, I have lost approximately (75) seventy-five sales, due to the fact that I was restricted from paying more than the "average" price for more than the average cars. This has resulted in the loss to me of several thousands of dollars, due primarily to the price fixing features of the Code.

The further compulsion of compliance with this price fixing provision will cause me further considerable and inestimable loss in sales.

I firmly believe in the principles of the Recovery Movement and have always adhered to the wage and hour provisions of the Code, in an endeavor to aid industrial recovery. However, the price fixing features of Article IV of the Motor Vehicle Retailing Code, are destructive of the fundamental purposes of the Recovery Act, and are retarding any possible progress of the industry, in that they stifle and thwart the purchase of new automobiles when trade-in values are not permitted at actual and true values.

Violations of the Code are prevalent and I believe that the enforceability of the price fixing provisions of the Motor Vehicle Retailing Code, cannot and will not be enforced in the industry.

Harold Perfit.

Sworn to before me this 21st day of July, 1934.
David B. Spielman, Notary Public, Kings County.
(Seal.)

[fol. 77] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF ALEXANDER J. RUSSELL

STATE OF NEW YORK,
County of ——, ss:

Alexander J. Russell, being duly sworn, deposes and says:

I am President of A. J. Russell Motor Sales, Inc., a Corporation, engaged in the sale at retail of automobiles and motor vehicles.

I am a duly authorized agent for the sale of Dodge and Plymouth automobiles, and have been such for years.

I am familiar with conditions prevalent in the retail motor vehicle trade, immediately prior to the adoption of the Motor Vehicle Retailing Code, and with the conditions that have arisen subsequent to its approval.

Prior to the adoption of the Motor Vehicle Retailing Code, the retailing of automobiles was subject to no price regulations. A customer was afforded by all dealers in general, a fair and actual value of a used car offered by the customer for trade-in purposes on the purchase of a new automobile.

With the approval of the Motor Vehicle Retailing Code, [fol. 78] including as it does Article IV, a restriction has been placed upon dealers, wherein they are restricted and compelled to pay to prospective purchasers of new automobiles, not the actual, honest and true value of the automobile offered for trade-in purposes on the purchase of a new car, but a price as defined in the said Article IV, not above the "average" price as ascertained.

With this provision, a prospective purchaser having a trade-in used car of more than average value, cannot be allowed more than the "average" price as ascertained.

This has resulted in a refusal of customers to accept the "average" price for their used car for trade-in purposes, where their used cars were better than the "average" price, demanding the actual fair value of the used car trade-in.

I have been compelled by reason of the Code to lose such sales, for I could not pay unto the prospective customer the actual value of his used car on a trade-in, where the actual value was in fact greater than the "average" price permitted to be paid by the Code.

This price regulation and restriction has therefore had a decided unwholesome effect upon my business.

1st. Customers have refused to purchase new cars, where they could not get a fair and actual value for their used car trade-in.

2nd. Where I have refused to pay more than the "average" price for a more than the average car, I have found that customers have consummated purchases of new automobiles and have secured for their used car trade-in from other dealers, values higher than those set by the Code as the "average" price, in apparent violation of Article IV, paragraph a, Subdivisions 1 and 2 of the Code.

[fol. 79] That dealers are violating the price provisions of the Code, is well known in the trade, for by numerous and divers subterfuges, used car trade-ins are accepted, at prices higher than the "average" prices set by the Code.

Since the approval of this Code, I have lost approximately sixty (60) sales, due to the fact that I was restricted from paying more than the "average" price for more than the average cars. This has resulted in the loss to me of several thousands of dollars, due primarily to the price fixing features of the Code.

The further compulsion of compliance with this price fixing provision will cause me further considerable and inestimable loss in sales.

I firmly believe in the principles of the Recovery Movement and have always adhered to the wage and hour provisions of the Code, in an endeavor to aid industrial recovery. However, the price fixing features of Article IV of the Motor Vehicle Retailing Code, are destructive of the fundamental purposes of the Recovery Act, and are retarding any possible progress of the industry, in that they stifle and thwart the purchase of new automobiles when trade-in values are not permitted at actual and true values.

Violations of the Code are prevalent and I believe that the enforceability of the price fixing provisions of the Motor Vehicle Retailing Code, cannot and will not be enforced in the industry.

Alex J. Russell.

Sworn to before me this 21st day of July, 1934.
David B. Spielman, Notary Public, Kings County.

[fol. 80] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HENRY CAPLAN

STATE OF NEW YORK,
County of Kings, ss:

Henry Caplan, being duly sworn, deposes and says:

I am President of Henry Caplan Inc., a Corporation, engaged in the sale at retail of automobiles and motor vehicles.

I am a duly authorized agent for the sale of Chrysler and Plymouth automobiles, and have been such for 18 years.

I am familiar with conditions prevalent in the retail motor vehicle trade, immediately prior to the adoption of the Motor Vehicle Retailing Code, and with the conditions that have arisen subsequent to its approval.

Prior to the adoption of the Motor Vehicle Retailing Code, the retailing of automobiles was subject to no [fol. 81] price regulations. A customer was afforded by all dealers in general, a fair and actual value of a used car offered by the customer for trade-in purposes on the purchase of a new automobile.

With the approval of the Motor Vehicle Retailing Code, including as it does Article IV, a restriction has been placed upon dealers, wherein they are restricted and compelled to pay to prospective purchasers of new automobiles, not the actual, honest and true value of the automobile offered for trade-in purposes on the purchase of a new car, but a price as defined in the said Article IV, not above the "average" price as ascertained.

With this provision, a prospective purchaser having a trade-in used car of more than average value, cannot be allowed more than the "average" price as ascertained.

This has resulted in a refusal of customers to accept the "average" price for their used car for trade-in purposes, where their used cars were better than the "average" price, demanding the actual fair value of the used car trade-in.

I have been compelled by reason of the Code to lose such sales, for I could not pay unto the prospective customer

the actual value of his used car on a trade-in, where the actual value was in fact greater than the "average" price permitted to be paid by the Code.

[fol. 82] This price regulation and restriction has therefore had a decided unwholesome effect upon my business.

1st. Customers have refused to purchase new cars, where they could not get a fair and actual value for their used car trade-in.

2nd. Where I have refused to pay more than the "average" price for a more than the average car, I have found that customers have consummated purchases of new automobiles and have secured for their used car trade-in from other dealers, values higher than those set by the Code as the "average" price, in apparent violation of Article IV, Paragraph a, Subdivisions 1 and 2 of the Code.

That dealers are violating the price provisions of the Code, is well known in the trade, for by numerous and divers subterfuges, used car trade-ins are accepted, at prices higher than the "average" prices set by the Code.

Since the approval of this Code, I have lost approximately one hundred twenty-five (125) sales, due to the fact that I was restricted from paying more than the "average" price for more than the average cars. This has resulted in the loss to me of several thousands of dollars, due primarily to the price fixing features of the Code.

The further compulsion of compliance with this price fixing provision will cause me further considerable and inestimable loss in sales.

[fol. 83] I firmly believe in the principles of the Recovery Movement and have always adhered to the wage and hour provisions of the Code, in an endeavor to aid industrial recovery. However, the price fixing features of Article IV of the Motor Vehicle Retailing Code are destructive of the fundamental purposes of the Recovery Act, and are retarding any possible progress of the industry, in that they stifle and thwart the purchase of new automobiles when trade-in values are not permitted at actual and true values.

Violations of the Code are prevalent and I believe that the enforceability of the price fixing provisions of the Mo-

tor Vehicle Retailing Code, cannot and will not be enforced in the industry.

Henry Caplan.

Sworn to before me this 22nd day of July, 1934. David B. Spielman, Notary Public. Kings County Clerk's No. 1118. Kings County Reg. No. 5434. Commission expires March 30, 1935.

[fol. 84] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GEORGE SHAPIRO

STATE OF NEW YORK,
County of Kings, ss:

George Shapiro, being duly sworn, deposes and says:

I am President of Atlas Garage Inc., a Corporation, engaged in the sale at retail of automobiles and motor vehicles.

I am a duly authorized agent for the sale of Oldsmobile automobiles, and have been such for six (6) years.

I am familiar with conditions prevalent in the retail motor vehicle trade, immediately prior to the adoption of the Motor Vehicle Retailing Code, and with the conditions that have arisen subsequent to its approval.

Prior to the adoption of the Motor Vehicle Retailing Code, the retailing of automobiles was subject to no price [fol. 85] regulations. A customer was afforded by all dealers in general, a fair and actual value of a used car offered by the customer for trade-in purposes on the purchase of a new automobile.

With the approval of the Motor Vehicle Retailing Code, including as it does Article IV, a restriction has been placed upon dealers, wherein they are restricted and compelled to pay to prospective purchasers of new automobiles, not the actual, honest and true value of the automobile offered for trade-in purposes on the purchase of a new car, but a price as defined in the said Article IV, not above the "average" price as ascertained.

With this provision, a prospective purchaser having a trade-in used car of more than average value, cannot be allowed more than the "average" price as ascertained.

This has resulted in a refusal of customers to accept the "average" price for their used car for trade-in purposes, where their used cars were better than the "average" price, demanding the actual fair value of the used car trade-in.

I have been compelled by reason of the Code to lose such sales, for I could not pay unto the prospective customer the actual value of his used car on a trade-in, where the actual value was in fact greater than the "average" price permitted to be paid by the Code.

[fol. 86] This price regulation and restriction has therefore had a decided unwholesome effect upon my business.

1st. Customers have refused to purchase new cars, where they could not get a fair and actual value for their used car trade-in.

2nd. Where I have refused to pay more than the "average" price for a more than the average car, I have found that customers have consummated purchases of new automobiles and have secured for their used car trade-in from other dealers, values higher than those set by the Code as the "average" price, in apparent violation of Article IV, Paragraph a, Subdivisions 1 and 2 of the Code.

That dealers are violating the price provisions of the Code, is well known in the trade, for by numerous and divers subterfuges, used car trade-ins are accepted, at prices higher than the "average" prices set by the Code.

Since the approval of this Code, I have lost approximately Twenty-Five (25) sales, due to the fact that I was restricted from paying more than the "average" price for more than the average cars. This has resulted in the loss to me of several thousands of dollars, due primarily to the price fixing features of the Code.

The further compulsion of compliance with this price fixing provision will cause me further considerable and inestimable loss in sales.

[fol. 87] I firmly believe in the principles of the Recovery Movement and have always adhered to the wage and

hour provisions of the Code, in an endeavor to aid industrial recovery. However, the price fixing features of Article IV of the Motor Vehicle Retailing Code, are destructive of the fundamental purposes of the Recovery Act, and are retarding any possible progress of the industry, in that they stifle and thwart the purchase of new automobiles when trade-in values are not permitted at actual and true values.

Violations of the Code are prevalent and I believe that the enforceability of the price fixing provisions of the motor Vehicle Retailing Code, cannot and will not be enforced in the industry.

George Shapiro.

Sworn to before me this 22nd day of July, 1934. David B. Spielman, Notary Public. Kings County Clerk's No. 1118. Kings County Reg. No. 5434. Commission expires March 30, 1935.

[fol. 88] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONVENING STATUTORY COURT—Filed Aug. 8, 1934

The complainant above named having moved this Court by order to show cause, dated the 3rd day of August, 1934, for an injunction pendente lite, as prayed for in the bill of complaint duly filed with the Clerk of this Court, and the said application having been made returnable on the 7th day of August, 1934, at the United States Courthouse, Post Office Building, in the Borough of Manhattan, City and State of New York, and the complainant herein by Miller, Paul & Placer, its attorneys, having duly applied for the appointment of a Statutory Court pursuant to Section 380, Article 38 of the United States Code, to hear and determine the application of the complainant herein, it is

[fol. 89] On motion of Miller, Paul & Placer, the attorneys for the complainant herein,

Ordered that the above entitled application for an injunction pendente lite, be and the same hereby is directed to be heard before a Statutory Court, pursuant to Article

38, Section 380 of the United States Code, on the 16 day of August, 1934, at Room 439, the United States Court House, Post Office Building, in the Borough of Manhattan, City and State of New York, at 11:00 A. M., in the forenoon of that day, or as soon thereafter as counsel can be heard, and it is further

Ordered that Martin T. Manton, Judge of the United States Circuit Court of Appeals, Second Circuit, Murray Hulbert, Judge of the United States District Court, Southern District of New York, and Robert P. Patterson, Judge of the United States District Court Southern District of New York, are hereby designated to constitute the said Statutory Court, to hear and determine the said application, and it is further

Ordered that a copy of this order be served upon the defendant herein, John J. Bennett, Esq., the Attorney General of the State of New York, and upon the Honorable Herbert H. Lehman, Governor of the State of New York, 5 days prior to the date set herein for the hearing of this application.

Robert P. Patterson.

[File endorsement omitted.]

[fol. 90] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN B. HULETT

CITY OF NEW YORK,
County of New York,
State of New York, ss:

John B. Hulett, being duly sworn, deposes and says:

That he resides at the Essex House, 160 Central Park South, Borough of Manhattan, City of New York.

That your deponent had been in the automobile business from 1906 to 1931.

That your deponent has been duly designated by the Metropolitan New York State Advisory Committee of the Motor Vehicle Retailing Trade as its Commissioner, which Committee was duly elected by the dealers of this district, which includes the Counties of New York, Bronx, Brooklyn, Queens, Richmond, Westchester, Nassau, Suffolk and

Rockland in the State of New York, and Hudson County, New Jersey, and approved by K. M. Simpson, National Recovery Administration Division Administrator and F. W. A. Vesper, Chairman, National Control Committee.

That your deponent is empowered by said committee in its behalf to administer the Code of Fair Competition for the Motor Vehicle Retailing Trade in said district.

That your deponent has been referred to by one David Spielman, President of the complainant in his affidavit.

That your deponent has read the Bill of Complaint and the affidavits submitted by the complainant herein to restrain the defendant, his deputies and others from enforcing, as against the complainant by way of criminal prosecution, or otherwise, any of the provisions of the said Code.

That your deponent calls this Court's attention to the fact, as stated in the said Bill of Complaint verified by the said David Spielman in the 21st Paragraph thereof, that (1) said complainant acknowledges violations of the [fol. 91] said Code; and that (2) by allowing customers and patrons "actual fair and honest values for used car trade-ins" that the complainant makes a fair return and profit on his investment.

That at this point no monetary loss has apparently been suffered by this complainant.

That his complaint is barren of any facts tending to show his version of the facts of the pending proceeding in the Commercial Frauds Court Division of the City Magistrates Court.

Deponent refers to the affidavit of Harold H. Straus, submitted with these papers, which sets forth the charge of which the said complainant complains.

That deponent avers on information and belief that the said complainant has since January 1st, 1934, opened two new branches of his business, which may account for the said Spielman's assertion that his payroll has increased more than 50%.

That deponent knows of no affirmative step on the part of the said complainant that he has enthusiastically cooperated to reemploy more people at a fair wage. As a matter of fact, a labor complaint was lodged against the Spielman Motor Sales Company in the early part of February, 1934, with our Code Authority. On refusal of said Spielman to sign a statement of the facts in the case the file was held in abeyance.

Your deponent refers to the affidavit of Jack Frost, whose affidavit is submitted with this affidavit in opposition, for facts and data showing the reasonableness of all the trade regulations provided for in the said code.

Your deponent likewise refers to the said affidavit of Jack Frost relative to the letter received by the complain-
[fol. 92] ant on November 27th from the National Automobile Dealers Association for the facts regarding the same.

It might be interesting to the Court to know that the said complainant became a member of the Brooklyn Motor Vehicle Dealers Association in 1925 and has been a member ever since. (See Ralph Ebbert's affidavit.)

Your deponent calls the Court's attention to the fact that at least upon one occasion, soon after the advent of the Code of Fair Competition for the Motor Vehicle Retailing Trade, he had a conversation with the said Spielman and tried to convince him of the great possibilities of the Code from the standpoint of the dealer and was informed by said Spielman that while he was sympathetic and felt that the Code properly enforced would be a great benefit to all dealers, he would not sign compliance with the Code until he had had further opportunity to discuss the matter with his factory officials and ascertain their attitude toward the Code with special reference to his connection with it in any way.

At this point your deponent desires to advise this Court that at no time to his knowledge has the said complainant, nor the said David Spielman assented to the Code. His statements in his affidavit to the effect that he has rigidly adhered to the provisions of the Code seem inconsistent with the fact that he failed to sign compliance with the Code.

That the National Automobile Dealers Association is the Association made responsible for the proper issuance of the said Official Used Car Guide Book, mentioned in said Spielman's affidavit, and deponent refers to the affidavit of one Ralph Ebbert, Manager of the Brooklyn Motor Vehicle Dealers Association, to the effect that the said Spielman was notified by the Association of all meetings for the discussion of the features of the Code, as well as the meet-
[fol. 93] ings for the appointment of a delegate to attend the hearings in Washington, at which meetings all the provisions of the Code were read and unanimously agreed to

by the said Brooklyn Motor Vehicle Dealers Association of which the said Spielman was a member.

Your deponent calls the Court's attention to the fact that the Bushwick Decatur Motors, Inc., one of the complainants' affiants, of which Edna Sperl Burke is Secretary, has been charged with two violations in the Magistrates Court and that these proceedings are now pending against the said Bushwick Decatur Motors, Inc.

Deponent has received no word from the said complainant, as Code Authority, of the 170 or 180 sales of automobiles, which were lost by complainant and by him allegedly lost because the sales were subsequently consummated by other dealers at prices prohibited by Code regulations. It should be the duty of the complainant if he knows of such violations of the code to report same to the Code Authority.

Deponent denies the allegation of the said Spielman that his records indicated over 1200 complaints of violations in the Metropolitan Area of New York, but deponent did talk with said Spielman and estimated that number of complaints.

Your deponent has, however, since checked the complaints made and finds that since October 3rd, 1933, there have been 964 complaints. A large percentage of these were unfounded, no violations having occurred. The dealers involved in proven cases are about 125, or about 8% of the total number of dealers in that our list of dealers, according to the record of the Secretary of State of New York, shows that there are 1559 dealers in the ten Counties under the jurisdiction of the Metropolitan New York State Advisory Committee, of which your deponent is the Commissioner.

[fol. 91] Your deponent denies that he and/or his office has at any time used "persuasion, then threats, than boycotts, then intimidation," as alleged by the said Spielman. As a matter of fact, the evidence in support of the pending proceeding under which the said Spielman is now in the Magistrates Court, was secured through the Association of which he is a member, as more specifically set forth in the affidavit of Ralph Ebbert, aforementioned.

Your deponent denies that he has sent any emissaries to the said complainant, promising abandonment of criminal prosecution in return for an admission of noncompliance.

Your deponent denies that every sale of a new automo-

bile by the complainant was pursued by your deponent or his office.

Deponent further denies that threats and intimidation were used against customers of the said Spielman who refused to answer questionnaires regarding their purchases.

Your deponent as Code Commissioner has caused questionnaires to be sent in the regular course of checking on some sales of all dealers for the protection of the public, and it may be that some of these have been received by some of said Spielman's purchasers. These questionnaires are invariably sent by mail, so that the question of intimidation could not take place. In a small percentage of cases investigators are sent out to call on these purchasers, but they are all instructed by your deponent personally to ask for the information desired in a gentlemanly and courteous way, and if the information is refused to further advise his office.

[fol. 95] Your deponent, in his various talks with numerous dealers in the Metropolitan Area, is led to believe, contrary to the assertions of the said Spielman in his affidavit that violations of the provisions of Article IV of the said Code are "rampant and wholesale," that the element among the dealers that is flaunting and violating the Code represents a very small percentage of the dealers in this district.

Your deponent is submitting the affidavits of dealers, attesting to the fact that they and their employees are reaping certain benefits under this Code, and many hundreds more such affidavits may be furnished if the Court so desires.

Your deponent recalls the incident of the queries made by the said complainant with regard to some of his fleet sales as stated in his affidavit. Your deponent took the question of permitting the said complainant to allow a discount in violation of the Code of the said customers of the said Spielman, and on determining the matter on advices given your deponent from the Washington authorities was obliged to advise the said Spielman that in the two instances involved the National Code Authority refused to give permission for the delivery of these cars.

John B. Hulett.

Sworn and subscribed to before me this 16 day of August, 1934. G. L. Schutzendorf, Notary Public.

[fol. 96] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HAROLD H. STRAUS

CITY OF NEW YORK,
State of New York,
County of New York, ss:

Harold H. Straus, being duly sworn, deposes and says:

That he resides at 1 West 85th Street, in the Borough of Manhattan, City of New York.

That deponent is an attorney duly licensed to practice law in the State of New York since 1907.

That deponent is a member of the firm of Messrs. Straus & Osserman, who have their principal place of business at 505 Fifth Avenue, in the Borough of Manhattan, City of New York.

That on the 3rd day of July, 1934, your deponent was specially deputized by Judge William C. Dodge, as District Attorney of New York County of the State of New York, as Special Assistant and counsel, and was sworn in as such special assistant District Attorney and counsel to the District Attorney by the Honorable Otto H. Rozalski, a judge of the General Sessions of the State of New York, for the County of New York, to prosecute in the name of the People of the State of New York any violations of the [fol. 97] Provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, and thereby became vested in accordance with the laws of the State of New York with the right and duty to prosecute said violations.

That on or about the 7th day of July, 1934, your deponent caused a summons to be issued against the complainant herein in the Commercial Fraud Court division of the Magistrates' Court of the City of New York, on application duly made in the name of the People of the State of New York, directing the appearance of the said defendant on the 9th day of July, 1934, before the City Magistrate holding court at the City Magistrates' Court at 300 Mott Street, in the Borough of Manhattan, City, County and State of New York, so that a hearing might be held on an information verified by one Jacob Gross for the violation of the provisions of Subdivision 2, Chapter 781, of the

Laws of 1933 of the State of New York, in that the complainant, its salesman J. Siegel, and its manager, one Weber, on or about the 26th day of May, 1934, offered to sell one Gustave Weinstein a Chevrolet car of the then retail market price of $720.80 for $675.80, thereby offering a discount of of $45.00 off list price, in violation of Article IV, Section B, Subdivision 2, of the Code of Fair Practice for the Motor-Vehicle Retailing Trade.

The said Code has been duly filed with the Secretary of State on the 5th day of December, 1933, in accordance with the said Chapter 781 of the Laws of the State of New York of 1933.

[fol. 98] Also that on the 29th day of May, 1934, the said complainant, Siegel and Weber sold to the said Weinstein the said car at a discount of $45.00 from list price, as aforesaid, which again violated the said Code, and more particularly in Article IV, Section B, Subdivision 1 thereof, references being herewith made to the said Code being filed with these papers.

That the said Complainant and said other defendants appeared at the Magistrates' Court on the 9th day of July, 1934, and a continuance of said hearing was ordered until the 13th day of July, 1934.

The hearing has further been continued and is now set for the 17th day of August, 1934.

That deponent desires to call this Court's attention to the fact that the complainant in no way sets forth in any of his papers submitted on this motion any facts in connection with the basis of the hearing now pending in said magistrates' Court.

Further, this complainant is being charged *not with a violation of giving an over-allowance on a trade-in transaction,* but that he is being charged with having offered and given a discount in violation of said Code.

Harold H. Straus.

Sworn to before me this 15th day of August, 1934.
Maxwell Sagat, Notary Public.

[fol. 99] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JACK FROST

CITY, COUNTY & STATE OF NEW YORK, ss:

Jack Frost, being duly sworn, deposes and says:

I reside in the City of St. Louis, State of Missouri.

I am the assistant to Mr. F. W. Vesper, the president of the National Automobile Dealers Association, which is a membership corporation duly organized under the laws of the State of Illinois.

The said Association is the one duly designated in the Code of Fair Competition for the Motor Vehicle Retailing Trade approved by the President on October 3rd, 1933, as the compiler and publisher of the official guide.

The monthly publication of the said official guide is prepared and published under my personal supervision and direction.

I also sit in at meetings of the National Control Committee as trade and business consultant and technical ad-
[fol. 100] visor.

I have been engaged in various phases of the business of retailing motor vehicles and long associated in the analysis of values of used cars.

I attended Stanford University and in my senior year I entered the United States Navy to serve in the World War.

During the period from 1918 to 1924, I was employed by J. Nadeau, Inc., which concern at that time was one of the largest automobile agencies of its kind in the United States; progressively as salesman and then sales manager.

Thereafter, and in 1924, I entered the automobiles business as a dealer in the retail sales of motor vehicles in Los Angeles, California, under the firm name of Frost & French. This concern is presently in business under the firm name of Frost & French, Inc., in Los Angeles, California, and I am still interested therein as a stockholder, being the vice-president.

In 1931, I organized the Unisales Service, Inc., which organization was incorporated under the laws of the state of California. This organization engaged in the business of sales promotion and dealt particularly with the subject of used car analysis.

I made an intensive study in connection with used car analysis for a period of approximately three years prior to this time and was recognized by the Ford Motor Company as an authority on this subject.

[fol. 101] The Unisales Service, Inc., operated with offices in fifteen of the major Cities in the United States and had in its personnel approximately one hunderd and eighty used cars experts including statistical experts, who were under my direct supervision.

This organization operated exclusively for the Ford dealers and itself was under the immediate direction of the Ford Motor Company.

I and Mr. M. E. Peters now on the National Automobile Dealers Association staff developed the formula for the publication of used car resale values and contracted with the Market Analysis Company, a Michigan corporation, for the compiling and publishing into book form of this information.

Due to the fact that the Unisales Service Inc. was practically alone in the field of scientific study and analysis of used car problems, it had among its personel individuals who were recognized as among those best trained in this field of endeavor.

Mr. M. E. Peters who was in charge of the market analysis organization, as well as other individuals in the Unisales Organization joined the National Automobile Dealers Association staff with me in or about the month of September, 1933. This provided the association with an already trained personnel and with valuable data with which to approach the task of building the official guide. Other experts such as Mr. Hubert Roy of the Ross Roy Service also joined the staff.

The formula for the development of the official guide was presented by Mr. M. E. Peters and myself to the Associa-
[fol. 102] tion, whose officials together with personal attendants presented all the facts thereon to the various Divisions, statistical and otherwise, to the Adminstrator in charge of preparing the Code for this Industry. This formula was only slightly changed when finally placed in the Code after close scrutiny and study by the National Industrial Recovery Boards.

The inability of the industry to pay fair wages and hours, because of losses sustained by them through the trade-in allowances given on the sale of new cars caused the Ad-

minstrator to finally approve and present the existing Code of Fair Competition for the Motor Vehicle Retailing Trade.

Various publishers had formerly issued so-called used car guide valuations and advocated the principle of "shock appraisels", which means the undervaluation of used cars. The effect of this on the public was to destroy their confidence in the dealer since the system thus followed was destructive to any confidence in appraisals thus offered and caused a vast amount of so-called shopping among dealers with resultant cut-throat competition. This principle was opposed by myself and other experts such as Mr. Peters and Mr. Roy, and finally most dealers. The principle of a best guide report was advocated by all those men and is the principle upon which we developed the official guide.

The foregoing is offered for the purpose of assuring this Court of the facts hereinafter stated.

I have read the affidavit submitted by Mr. K. J. Ammerman, and from my knowledge of the various investigations, [fol. 103] hearings and conferences held by the Administrator and Deputy, to the best of my knowledge I know the facts therein contained are true and correct. The conclusions arrived at are based on the reports that were submitted, some of which I assisted in preparing.

I have also read the affidavit of the complainant herein, as well as the affidavits of complainant's other effiants submitted in behalf of his motion to which this affidavit is submitted in opposition, and I have also read the bill of complaint against the defendant herein.

A reading of the aforesaid papers discloses that most of the statements made are general and are not specific. These general statements are not sustained by either fact or statistical information.

The Court should note the fact that the complainant in his papers admits that he is a violator of the Code.

Nowhere in his papers does the complainant aver that under the provisions of the Code, or the National Industrial Recovery Act, he has attempted to correct any of his alleged inequalities or inequities, through the Code has been operating as a law since October 3rd, 1933. All of the public hearings held before the Administrator and the other divisions of the National Recovery Administration before the adoption of the Code were open to the complainant to make its appearance and offer its suggestions.

The records of the National Automobile Dealers Association definitely show that the said complainant was certified to the National Automobile Dealers Association as a mem-[fol. 104] ber from the Empire State Association under date of August 10th, 1933. The hearing in Washington the Code of Fair Competition for the Motor Vehicle Retailing Trade presented by this Association took place on Monday, September 15th, 1933. The press of this country published the fact that this meeting was to be held on said date. The National Automobile Dealers Association in the issuance of its bulletin sent to every listed member likewise reported the date of the hearing. A copy of the said bulletin was forwarded to the complainant herein.

The complainant herein after a period of nine months since the adoption of the Code now for the first time endeavors to assail the Code and the laws under which it was enacted and after one of its violations has brought him to answer a charge in the criminal Courts of this State.

The Court will note that the complainant's papers evidence that fact that neither the complainant nor David Spielman are acquainted with the statistical angle and the real status of the industry since the enactment of the Code.

I shall now take up in somewhat more detail the conditions in the industry which brought about the necessity for the adoption of the Code and will then describe the form and operation of the official guide book as developed pursuant to the provisions of the Code. This will definitely point out that the trade regulations therein set forth are reasonable and for the benefit of the public, as well as the dealers.

Trade In Allowances

The dealer must necessarily conform with selling cars at prices satisfactory to the manufacturer, or else lose his [fol. 105] franchise. At all times a dealer can be put out of business should the factory with whom he has a franchise determine to cancel the same. With virtually no exceptions dealer or agency contracts in this industry are so drawn.

Were the problem only that of selling cars at retail for cash or on terms of credit, the only economic test of the sale of the cars would be the amount of competition between the various manufacturers of the various cars in a particular price class. In other words, that part of the public

desiring to buy Fords would go to a Ford dealer, and that part desiring to buy Chevrolets, which are in the same price class would go to a Chevrolet dealer. The dealers function would be and still is that practically of an agent, of the factory, and his profit would be and still is the discount or commission allowed by the factory. This permits of full and free competition between the factories in their particular price class, and accordingly the public has an open market to buy its cars.

The vice and trouble, however that has grown in this industry is due to the fact that the buying public desire to trade in their used automobiles when obtaining a new one from the dealer. In other words, a duel service is performed by the dealer, to wit:

(1) Selling new cars; and

(2) Disposing of customers' old cars.

The factories in no way desire to become involved in disposing of the old cars of the purchasers of the new, passing this onus directly to the dealer. The industry, therefore, has now found itself in the position where between eighty and ninety per cent of sales of new cars involve the disposition of old cars.

[fol. 106] I am able to state that ten years ago dealers were trading in approximately 22 used cars for every 100 new cars sold at that time it did not matter greatly if a dealer made an over-allowance on a used car because out of each 100 new cars that he sold there were approximately seventy-eight of them on which he made a full profit, inasmuch as no trade-in was involved. The dealer could, therefore, stand a loss of profit or price cut on the new car through allowance errors on the twenty-two used cars which he took in and still show some gross profit return.

In 1932 this industry has reached a point nationally where practically every new car sale involved the trade-in of a used car.

At the time that the Motor Vehicle Retailing Code was being presented to the N. R. A., the N. R. A. made a test of over five hundred dealers' costs of handling used cars, and it was found that the average costs of these five hundred dealers amounted to twenty-one (21%) per cent for handling and reconditioning the used car.

By 1929 the used car was such a hazard through new car price alteration that it became practically impossible to get salesmen to function in the capacity for which they were employed, namely, to go out and bring in business to the dealers' salesroom. After a salesman would spend the necessary time in developing a prospect and making an offer on the used car, in many cases, another salesman, would arbitrarily make a higher offer on the used car, with the result that the new car price set by the factory and beyond the dealer's control, was arbitrarily changed or reduced.

[fol. 107] This condition became so acute that sound methods were practically forgotten and buyers were converted into shoppers, and by constant increasing of allowances of one dealer as against another dealer. Factories attempted to stay these conditions by increasing their prices with over-allowance pads for the dealers. This caused new car prices to be thus raised to provide dealers with added margins for sustaining these losses. This system failed due to the inequity it worked on those buyers who had no used cars to dispose of. Some factories then required their dealers to show no gross used car loss in their operations. This failed since no measuring device was available and deemed reliable. This practice became so general that by 1933 it was reliably estimated that not over 5% of the automobile dealers in the United States were solvent.

By this time the income of salesmen had reached a point where nationally they averaged less than $900.00 a year. For the automobile salesman to maintain the scale of living requirements of his position and at the same time to support his family was impossible.

Banks refused credit to automobile dealers as such in view of the fact that the product which they sold had no established price, inasmuch as the delivered price of an automobile meant nothing when any dealer who chose to do so could alter this delivered price by merely increasing the allowance of a used automobile.

This naturally resulted in a terrific loss to the automobile dealers throughout the United States and a dissipation of their capital. The result was that all dealers who were [fol. 108] not encumbered by leaces which prevented them from going out of the business got out and salvaged such of

their remaining capital as was possible. The balance who were unable to close their businesses fired every employee that they possibly could, cut the wages of the remaining employees, and endeavored to continue only through the sufference of their creditors.

It is — well known fact that where a dealer's franchise previous to 1925 commanded a premium, and individuals sought dealer contracts, the result in 1933 was that the factory sought dealers of any type or character, under any sort of promise in order to secure representation. The franchise of a dealer had become almost entirely discredited and without value.

This condition is directly traced to the fact that there was no established price on a new automobile since this price could be changed by any dealer through merely increasing or reducing the allowance of a used car.

The attempts made in the past to meet this situation in the form of so-called used car guide books such as described above, proved inadequate.

When the market becomes a buyer's market rather than a seller's market in the economic cycles of industry, many dealers in this industry, in their attempt to keep their franchise or contracts with the manufacturers and so that they buy the quota of *ere-* required by the manufacturers, and trusting for better times, will chisel and adopt all practices, ethical or otherwise, for the purpose of meeting the [fol. 109] desire of the buying public's market, and either grant discounts from the new car's price, irrespective of what their profits therein would be, and oft times trying to save their profit to a limited extent by an average allowance on the value of the used car, or arranging to give the buyers of new cars insufficient and improper service under the guarantees; and when competition becomes keener at such period and in such a market it becomes the survival of the fittest among the dealers, which means that the little concerns which have small capital invested, by virtue of insolvency or otherwise, will have to go out of business and the larger concerns will lose such of their capital investment, or even with respect to larger dealers, also go into bankruptcy. Thereby an entire industry becomes disorganized, disrupted, and the greater number of its four million employees lose positions, and a major depression is on.

Now to correct these trade abuses, the President of the United States, viewing the same depression in other industries, and recognizing the emergency of the situation, created an act which title speaks for itself, to wit, the National Industrial Recovery Act, and Congress in its wisdom, realizing the hundreds of industries involved, gave power to the President to create administrative offices, to investigate the vices and abuses in various industries, and if emergency measures were needed, to create them so that codes of fair practice could be expeditely established and men be taught to conduct their business in honest fashion, so that those dependent upon the particular industry by way of labor, and the dealers themselves, should and could create a profit and creep out of the mire of depression. Accordingly, the Code of Fair Competition of the Motor Vehicle [fol. 110] Retailing Trade was adopted.

Pursuant to this Code, the official Guide Book was established in the manner provided in the Code.

Need for Official Guide

A report in the form of the Official Guide Book is a necessity not only from the standpoint of the dealer, but from that of the public as well. Without knowledge of all sales made within their trading area, any used car manager's or appraiser's knowledge of values was formerly limited exclusively to the cars which they had sold in their own used car department.

Over five thousand different makes, models and series of cars are in the hands of the public today, any of which may be offered at any time for trade-in. As a rule, a majority of the cars which the average dealer handles in his used car department are of the same make which he handles new. A used car manager's knowledge of values of other cars is necessarily very limited. The number of used cars he handles compared to the five thousand sorts of potential appraisals proves the need for such a Guide. It is, therefore, apparent that where all sales within a district can be reported to a control source and then made available to each dealer, that their knowledge of values of these cars is far more complete and their appraisals are far more accurate.

A report of all cars sold gives dealers accurate knowledge of what price the public is paying for such makes and models of cars, and therefore, they are able to offer the public what their cars are actually worth.

[fol. 111] This brings a standardization of value which makes possible the elimination of the faulty and unfair practice of paying more for one article than it is worth and on another article paying less than it is worth.

Method Used in Building the Official Guide

The National Automobile Dealers Association as made accessible to all dealers of record within the United States, forms upon which to report their used car sales. Copies of these forms are attached. Explanations were also sent out as to how these forms were to be filled in, as well as a sworn statement covering the fact that they were filled in correctly.

These used car sales report forms, upon being received by the N. A. D. A. are first serially numbered then sorted according to states and trading districts, then to makes and yearly models. Tabulation of these sales reports for the various districts in the United States is carried on prior to publishing the Official Guide Book each thirty days.

The Official Guide Book is published every month, using sales of the preceding sixty days, as provided in the Code. The method in which the report is assembled is as follows:

After the sales reports have been sorted to districts, makes, years and models and body styles, then the national average of each make, each year, each model and each body style is established. The Code provides that where five or more sales are reported from within a district that the average sale price shall be used after the twenty percent [fol. 112] of the low sales have been eliminated.

Each month the sales reported from each district are compared by makes and years to the national average, and their percentage to the national average carefully noted. A careful check is made of all sales reported from within the district, as well as the national averages, and charts are drawn showing the relationship of price between different makes of cars—for example, between Buick, Studebaker, Chrysler, and so forth.

Sales are also checked within the district, as well as nationally to establish the ratio of values between different

yearly models of the same make. Example: between a 1928 and a 1929 Chevrolet. This check is also made nationally.

The relationship of value between body models within a certain year is also checked, both within the district and against the national average. Example: the relationship in value of a five passenger sedan against a five passenger coach, and two passenger coupe, and etc.

Each month the current sales are checked against the averages of the previous period in order that our Statistical Department may accurately follow the appreciation or depreciation of cars from one book period to the next.

A dummy is then made up and the averages of each trading area are placed in this dummy and indicated. On such types where there were insufficient sales reported within a district to establish an average, the Code provides that the dealers shall establish the price, subject to the Administrator's approval. The Statistical Department projects a figure as a guide on such cars, based upon the date above [fol. 113] outlined. Example: if there were ten body models in a particular make and year of car, out of which only five had had sufficient sales reported to establish an average, the Statistical Department projects—figure as a convenient guide for the dealers who are called to establish this price in lieu of an average on the remaining five body styles. These figures are based on the percentage relationship of this particular make, yearly model and body style, within this particular district, to the national average figures, as well as the other data explained above.

These dummies are then sent to the dealers, to establish prices on such cars where there are insufficient sales reported to record an average. The dealers handling the particular make either revise or accept the projected figures which were established by the Statistical Department for their convenience. The average figures, cannot be changed by the dealers.

After the dummy has again been reviewed by the Statistical Division and all data checked and written up in journal form for the Administrator, it is published in its final form—the Guide Book.

Report of Best Grade Cars

The complainant entirely avoids the big point in connection with the building of the Guide Book as a report con-

cerning the value of best grade automobiles. Irrespective of any contention that an average, of necessity, must be [fol. 114] built from samples which range in value above and below the average, two other elements enter in connection with the practical use of the Official Guide, and its basic principle of reporting the value act by the public on the best grade cars.

The first consideration is one of time. By reason of the compilation of sales from a period sixty days previous to the physical compilation of such sales; the element of time thus entering gives the finished book in the current and practical use of the book a figure from which the current market has dropped away. In a rising market, it faithfully reports the rise and then when the inevitable decline starts again, it reports high for another two months. Obsolescence and/or wear causes automobiles to decline in value. Example: a new 1923 car never used would today only be worth a small percentage of its 1923 value.

The average rate of depreciation on motor vehicles will run from 2½% per month to 3½% per month dependent on the price class upon which the rate is figured. Consequently, it is obvious that as such as 7% depreciation can have occurred on an automobile between the time of its sale to a user—consumer, and the time sixty days later when such sale is tabulated with others into an average.

The time element enters again in connection with the tabulation of these sales reports and the final printing and shipping of the finished books to the dealers for used in the current market.

The books are issued each thirty days and are built from [fol. 115] sales of the previous sixty day period, but the tabulations necessarily are cut sufficiently after the sixty day period to permit statistical operations and printing and shipping. Effective dates for use are set to permit these operations.

We are, therefore, able to conclude that each appraisal controlled by the book is made on a car which has actually depreciated at the time of the appraisal from the value which was established on it at the time of its previous sales, which sale was used in publishing the report.

The resultant effect of this method must be considered. Current practical use in appraising with the book must recognize that as much as 7% depreciation can have oc-

curred in the car's value at the time appraisal is made. The last appraisals made at the end of each month, therefore, will include instances in which the appraisal is based on a resale average developed from reports sent in ninety days previous to the actual making of this particular appraisal.

In this instance, as much as 10½% depreciation can have occurred in the value of the automobile being appraised.

The second major element which is not considered in the complainant's attack on the "average principle" is the deletion of the lowest 20% of these sales which are used to make up the averages. This is a mandatory code provision.

By reason of this provision, sales which concern "junk" or wrecked cars are automatically eliminated from any consideration in the average, but so also are sales which are [fol. 116] not of such a nature as to be termed junk or wrecked types. The deletion of the low 20% eliminates from use in the average finally tabulated, many sales which run within a few dollars of the median average of all samples concerned.

The deletion of the low 20% removes vast numbers of sales which are close to what would otherwise be the arithmetic average of all samples concerned.

The effect of this deletion, therefore, is to throw the resultant or reported average high up into the bracket of those sales reported which were of the highest value.

A practical examination of the statistics involved in the compiling of each book will quickly demonstrate and prove that the resultant averages published in the book are not only in this higher bracket, but on an examination of an average of these sales which were the highest, we find but few which are not closer to the resultant published figure than in the arithmetic average of all samples close to the resultant published average.

Best Grade—Better Grade

It is an established fact that the difference between an automobile's value which can be termed best grade and the one which can be termed better grade is so slight as to be impossible of standardization or measure. This difference can be likened to difference in individual appeal of color or style in articles of similar value and price.

Practically, we find that the public purchases used automobiles of the better grade quite as readily as they do auto-
[fol. 117] mobiles of the so-called absolute best grade.

We find further that the public is unwilling to pay a higher price for the car termed best grade than for the car termed better grade. The public will purchase that which they determine is best grade as preference over that which *is* they believe is better grade, if the purchase can be made at virtually the same price and should the particular color or outward appearance appeal to the individual and influence his desire.

A review of the facts pointed to above discloses that the official guide book published by the National Automobile Dealers Association is in the final analysis a market report concerning the value of best grade automobiles.

Analysis of Spielman's Sales Reported to N. A. D. A.

All of the reports of used car sales made by the complainant to the National Automobile Dealers Association have been examined.

In analyzing these sales during the period of this Code, we have compared each sale to the Official Guide Book figure current at the time the complainant made such sale to a consumer. We are entitled to conclude that if the analysis of these transactions which are set forth in detail below is properly viewed, then complainant has definitely indicated that the prices reported in the Official Guide Book were far too high if compared with their particular sales of used cars.

Three hundred and seventeen sales of the complainant
[fol. 118] reported to the Association by it were made at less than the amount of the figure published in the Official Guide current with such sale.

Eighty-seven sales of the complainant reported to the Association by it were at an amount greater than the figure published in the Official Guide current at the time of such sale.

Seventy-eight plus per cent. of complainant's sales were lower than the Official Guide.

Twenty-one plus percent. of complainant's sales were higher than the Official Guide.

The complainant have reported since the beginning of the Code and to August 11th, 1934, four hundred and

twelve used car sales. Eight of these four hundred and twelve were incomplete reports and are not used in this analysis. They were used in compilation when received, but date of receipt cannot now be determined.

If the complainant is willing to allow (for a used car taken in trade on a new car being sold) an amount equivalent to that which complainant could sell such used car for to another buyer, the complainant, therefore, could have allowed three hundred seventeen new car purchasers —total sum of $3342.50 more than they apparently did and still make such allowances under this Code. This is an average of $10.54 per car greater amount they could have allowed than they were able to sell these used cars for.

Furthermore, if the complainant had allowed the maxi-
[fol. 119] mum provided by the Official Guide, then on these three hundred and seventeen sales they would have allowed $74,150.00. They sold these three hundred and seventeen cars at a total of $70,807.50.

They would have thus suffered a direct loss of	$3,342.50
If they paid the usual 5% commission to salesman for these sales, the cost would be	$3,540.38
If they spent the average reconditioning cost per car needed to even fairly insure satisfaction to the used car consumer, they would have spent an additional	$7,186.95
Total loss	$14,069.84

In the instance of those customers whose cars they sold at greater price than the Guide and whom they would have allowed (had no Code limitations affected their business) more money predic-ted upon their allowing the new car purchaser an amount equal to that which they could obtain for the used car in the sale of it to another consumer, they could have allowed eighty-seven purchasers an amount of $49.13 car more than they were able to under the Code limitations.

Had they allowed the eighty-seven new car purchasers whose cars they sold in excess of the Guide prices, the total of the sales price obtained, they could have allowed each of the eighty-seven $49.13 per car more than the maximum provided in the Official Guide.

[fol. 120] If they paid 5% commission to salesman to sell

these cars, this cost would equal $15.00 per car. If they spent the national average per car of reconditioning costs it would equal $26.56 per car.

This total of commission and reconditioning expense—$41.56 per car. This leaves $7.57 per car more than the complainant would have allowed each of these purchasers of new cars whose used cars they sold in excess of the Guide. If he deducted for his salesman's commission and reconditioning expense which is a regular trade procedure.

If the complainant's interest in its customers is as faithful as it contends, we are at a loss to understand how they divided this interest between the two types of consumers.

The Official Guide Book prices are high prices and a report concerning the value of best grade automobiles. This is proven even in the instance of complainant which concern was unable to sell seventy-eight plus per cent, of its used cars at prices as high as the Guide.

We have proven that complainant either lost $14,069.84 on three hundred and seventeen transactions, if it allowed the maximum which it elsewhere state- is the minimum, or it must admit the Guide is too high in seventy-eight plus of appraisals. In only eighty-seven transactions could they have allowed $7.57 average per car more to these eighty-seven customers and fairly paid salesman and paid average attention to reconditioning expense.

[fol. 121] A study of the actual average reconditioning costs attendant to the preparation of used motor vehicles by dealers for resale, reveals that the average amount per each yearly model of motor vehicle absorbs virtually all *of the 5%, 10% and 15% deductions* which are stipulated in the Code. An analysis of over one hundred and fifty thousand transactions demonstrates this fact. The obvious need, therefore, for the amount stipulated in the Code is easily proven.

Where the Code provides 5% for a particular group of automobiles, we find average reconditioning costs running 5.4% on low priced vehicles to 3.8% on high priced vehicles. Where the Code provides for 10% we find average reconditioning running from 7.7% on low priced cars to 6.8% on high priced cars. Where the Code provides for 15% we find the average reconditioning expense running for 17.2% on low priced to 12.6% on high priced vehicles.

These are the repair costs to the dealer alone and include

none of his needs for defraying handling costs, commissions, etc.

[fol. 122] Accurate Tabulations of Spielman Motor Sales Co. Inc. Used Car Sales Reported to N. A. D. A.

Complainant's Sales Under the Guide

317 Book Sales	83,686.00	Total of Guide.
317 Actual Sales	70,807.50	Complainant's sales.
	$12,878.50	
$12,878.50 ÷ 317 =	40.63	Average amount per car it sold less than book price.

Complainant's Sales Over the Guide
(10)

87 Actual Sales	26,069.00	Made by complainant.
87 Book Sales	24,296.00	
	$1,775.00	
$1,773.00 ÷ 87 =	20.38	Average amount per car sold over Book Price.

Total All Complainant's Sales

404 Sales Book	107,982.00	Total Official Guide.
404 Sales Actual	96,876.00	Complainant.
	$11,106.00	Book Sales over Actual Sales.
$11,106.00 ÷ 404 =	25.01	Average amount per car on total sales, which it sold under the gross Book.

Total sales value of all cars sold	$96,876.50
Total Net Allowance—Under Code and Official Guide	95,945.00
	$931.50

$931.50 ÷ 404 sales = $2.30 per car he could have allowed if he allowed the full amount that he sold the used car for.

[fol. 123] Accurate Tabulations of All Spielman's Used Car Sales Reported to N. A. D. A.

Spielman's Sales Under the Guide

317 Book Sales	$83,686.00	Total to Guide
317 Actual Sales	70,807.50	Spielman's Sales
	$12,878.50	
$12,878.50 ÷ 317 =	40.63	Average amount per car he sold less than book price.

Spielman's Sales Over the Guide

(10)

87 Actual Sales	$26,069.00	Made by Spielman
87 Book Sales	24,296.00	
	$1,773.00	
$1,773.00 ÷ 87 =	20.38	Average amount per car sold over book price.

Total All Spielman's Sales

404 Sales Book	$107,982.00	Total Official Guide
404 Sales Actual	96,876.00	Spielman
	$11,106.00	Book Sales over Actual Sales
$11,106.00 ÷ 404 =	25.01	Average amount per car on total sales, which he sold under the gross book.

Total sales value of all cars sold	$96,876.50
Total Net Allowance—Under Code and Official Guide	95,945.00
	$931.50

$931.50 ÷ 404 Sales = $2.30 per car he could have allowed if he allowed the full amount that he sold the used cars for.

This would cause Spielman to lose Salesmen's commission of 5% and reconditioning expense as indicated heretofore, as direct losses. In addition his cost of handling would be another loss.

[fol. 124] At the time that the Motor Vehicle Retailing Trade Code was being presented to the N. R. A., the N. R. A. made a test of over five hundred dealers' costs of handling used cars, and it was found that the average costs of these five hundred dealers amounted to twenty-one per cent for handling the used car.

Concerning Official Guide Book Averages

Since complainant handles the Chevrolet automobile, it is interesting to note the effect of Code Provisions on Chevrolet cars specifically. An analysis of one hundred thirty-three reported sales of a particular model of Chevrolet and concerning a 1928 automobile indicates that of this number of sales, one hundred and seven were used in the final calculations. The median average of the samples examined indicates that the average value is $60.00. Sales ranging from a low of $10.00 to a high of $40.00 were eliminated entirely from the tabulation of these samples which finally developed into an official price in the Guide Book. The highest sale eliminated amounted to two-thirds of the value indicated through the median average. The median average of these sales was $60.00. The published or resultant average printed in the Official Guide was $68.00 or 11.33% higher.

Taking another case, we point to an examination of one hundred sixty-six samples which after deletion of the low 20% left one hundred thirty-three samples with a median average of $465.00. The highest sale deleted from the calculations was $435.00, obviously not junk, being a sale at only $30.00 less than the median average. The price printed in the Official Guide, however, was $477.00 or [fol. 125] 10.65% higher. These samples are typical and therefore we can conclude that the Guide figures are 15% plus to 22% plus higher than any so-called average as is

contended by the complainant. We reach this conclusion through adding the average monthly rate of depreciation to the percentage elevation caused by the deletion of the low 20%.

Now returning to complainant's actual sales since the Code started, we point to the fact that of the 57 made at higher than the Guide, twelve of their sales were made at from 0.2% to 0.1% higher than the Guide.

Sixteen of their sales made in excess of the Guide were made from 1.27% to 2.95% higher.

Thirty-two of their sales made in excess of the Guide were made from 3.62% to 9.51% higher.

Fourteen sales made in excess of the Guide were 10.71% higher to 15% higher.

Six sales made in excess of the Guide were 15.38% higher to 19.42% higher.

Six sales made in excess of the Guide were 20% higher to 24% higher.

One sale made in excess of the Guide was 39% higher.

Tabulated in another way the eighty-seven sales made by complainant of used cars at prices above those shown on the Official Guide Book, were at the following differentials above the Guide Book prices:

[fol. 126] 21 at prices in excess of the Guide by $5.00 or less.
11 at prices in excess of the Guide by $5.00 to $10.00.
14 at prices in excess of the Guide by $10.00 to $15.00.
20 at prices in excess of the Guide by $15.00 to $25.00
21 at prices in excess of the Guide by more than $25.00.

Another example proving that the Official Guide Book is a report on best grade cars and shows high prices, is set forth here. On current cars, in many cases, the dealer may allow a price on a current model car which is actually in excess of the price that he pays the factory for this car now. We cite the example of a 1934 series "President C" Model Studebaker, on page 225, of the August issue of the Official Guide Book for District 2, which embraces Metropolitan New York.

The maximum allowance on a five-passenger Sedan is $1131.00 less the 5% mandatory reduction, which is $1074.45 net allowance, should the dealer wish to allow this amount. The factory list price of this same car is $1285.00. Assuming that the dealer receives a 25% discount from the factory

list price, or $321.00, this car would cost the dealer $964.00 new, plus freight. As a used car, however he can pay as high as $1074.45.

Consumer Interest

The number of used cars sold through the United States is approximately twice the number of new cars sold. If a dealer over-allows for a used car which is being traded in upon a new one, then in selling same he must either charge the buyer of the used car, which group out-numbers the new car buyer group two to one, and represents the poorer class, more than the car is worth, thereby taking [fol. 127] advantage of the used car buyer. Otherwise, he must absorb the loss himself, or take it away from his payrolls.

It can be readily seen that in handling approximately two cars for each new car sold, and in some classes dealers as high as five and six used cars for every new car sold, consumer interest must include this vast field of used car consumers.

If the complainant's interest in their customers extends only so far as those customers who purchase from them new automobiles, we can conclude that their desire to return to old methods of robbing Peter to pay Paul is in the interest of one consumer and to the detriment of the other.

It is further obvious that in view of the Official Guide establishing a sound report of value of best grade automobiles that those few sales which Spielman made of used cars at a price substantially higher than the price reported in the Official Guide can be considered as sales made to the detriment of this second type of customer.

It is apparent therefore, that the complainant's interest of these particular customers or their desire to return to old methods does not include interest in the welfare of buyers of used cars.

It is obvious that 78% plus of their sales going at amounts substantially lower than the book that this concern knew the Book was high. Further, they were so informed when they made these several higher sales to people thy probably victimized in an attempt to recoup other sales losses.

[fol. 128] Principle of Selling Cars for More Than Their Worth

The principles and methods necessary to selling used automobiles at more than their value is known to every member of this trade and is a principle which this complainant wishes to continue to the detriment of the more innocent among its customers. Deliberate selling of a used car for more than its true value can be accomplished through the misuse of confidence placed in the seller by a prospect who frankly asks for a fair and square deal, and permits the seller to indicate to him what car is proper for him and then takes the seller's word for the fact that it is a good and true value.

The complainant apparently wishes to continue this malicious practice of taking advantage of the innocent in this vast field of consumers who buy used cars, so that through its robbing of them, it may employ the trickery of price discount in the sale of new cars through the artifice of so-called "over-allowances" on used cars taken in trade.

It should be noted at this point that in these United States fully two times as many used car transactions are made each year as there are new car transactions. Those people who purchase used cars are generally a class of people in need of transportation and who buy used cars not as a preference to the ownership of a new motor vehicle, but by reason of their financial inability to enjoy the pleasure and economy of operation of a new car on account of its greater initial cost.

[fol. 129] The history of the automobile retailing trade clearly shows that if a lesser margin of profit is taken in the sale of the new car than is regularly provided when no trade-in is involved, then this loss differential must be taken from some other source.

Only three methods avail themselves to the dealer for the return to his coffers of this differential. Either it must come from his own capital, or from the payment of substandard wages to employees, or it must come from some innocent purchaser of the used car.

Revealing the condition of this industry prior to this Code, we can therefore, conclude that the distress in which it found itself arose largely from the fact that the great majority of dealers were inherently sincere and honest, and therefore were attempting to deal fairly with the public

and their employes. This conclusion we reach by reason of the fact that they were either unable to obtain from the more innocent purchasers of used cars an overcharge to compensate for the loss sustained through an over-allowance when selling a new car, or that they were unwilling to practice the trick and device necessary to the obtaining of this difference from their used car customers.

Another factor enters in connection with this same point. The public who purchase used cars and who have become experienced in such purchases have learned to shop throughout the market for the purpose of comparing values in order that they obtain a good used car at a fair price.

Consequently, the trade quite generally finds itself con- [fol. 130] fronted with a condition in which the public, or buyers of used cars, actually establish the value of such used cars. These buyers either refuse or accept the car offered at a specific price predicated on what they consider its value to be as compared to the same articles availability at a different price.

Letter Returning Sales Reports

In the affidavit of the complainant, reference is made to a letter sent, concerning used car sales which were questioned by the National Association (see page 13 of affidavit of Spielman). That letter was deemed abrupt and to some extent inaccurate. A letter of explanation was immediately sent following the letter mentioned.

This letter was a test made after the preliminary compilation of sales received for the months of September, October and November had been set in the form of a dummy, and submitted to the dealers of each district in order to supply a valuation where there were insufficient sales to establish an average. Upon submission to the dealers, we received a storm of complaints stating that the prices in the dummy were entirely too high, impossible of accuracy and of no value to the dealers.

In order to make a test to determine if dealers were accurately and correctly reporting their used car sales, sales were pulled at random from each district and sent back dealers, along with the letter referred to above. In some instances, these sales reports were returned with sharp criticism on the dealers' part for questioning same, and stating that they were absolutely authentic; while in other

cases declare returned sales reports with the notation that they were not filled out correctly.

[fol. 131] At the time this letter was sent, the Compilation Department of the N. A. D. A. was working under great stress in order to complete the first edition and place it in the hands of all dealers at midnight on November 30th, 1933. The letter which was sent out was written by one of the employees of the Compilation Department, and after being read by officials, it was seen that the letter was abrupt and inaccurate. We, therefore, immediately issued a letter, expressing regret for the abruptness of this mimeographed letter, and explaining why these sales reports had been returned. A copy of that letter is attached hereto marked Exhibit A and made a part hereof.

Furthermore, a public notice was printed in the N. A. D. A. official bulletin in connection with this same subject and since the complainant is a member of the Association, quite obviously, the notice reached it by either of the two means. A copy of the published notice is attached hereto marked Exhibit B and made a part hereof.

The right to make the test in connection with the letter referred to is obvious. The Code specifically provides for the use of sales reports from a period of sixty days previous to the period of compilation and at the same time evidence is herewith submitted showing clearly that the Association used reports covering a period of ninety days previous to the publication of the first official guide.

[fol. 132] Nothing in the Code stipulates that sales reports cannot be questioned when they are deemed inaccurate or carelessly rendered by members of the trade, but at the same time, the Association has specifically used each and every report offered it when the dealer has returned the report stating that it was correct. The practice of returning reports for questioning as to their accuracy is engaged in by many statistical organizations as a means of attracting the necessary interest on the part of the individual reporting to the need for accuracy.

The foregoing is the only instance of any general return of used car sales reports. All of the reports so returned were used in the compilation, after making corrections which were disclosed by this check.

Since that time reports have been questioned by the Statistical Department whenever there was an indication

of substantial inaccuracy. But such reports when returned by the dealer with corrections or with the statement that the original report was accurate have been used in all compilations. The final prices arrived at in all issues of the Guide Book have been determined in the manner hereinbefore described, and at no time has there ever been used any arbitrary figure. The prices published in the Guide Book have been at all times, the prices determined through the medium of averages developed correctly under the Code provisions.

New Car Price

The automobile dealer is in all practical ways an agent [fol. 133] of the automobile manufacturer insofar as the sales of new cars are concerned.

The automobile dealer does not stipulate what is the new car sales price. The new car sales price is established by the automobile manufacturer in the following manner:

From the price which the manufacturer established as his factory list price and which price is widely publicized, the automobile dealer is given a discount which, therefore, becomes his total gross profit. The amount of this discount is entirely under the control of the manufacturer. The amount of the factor- list price is entirely under the control of the manufacturer. In arriving at the delivered price to the ultimate consumer, this Code provides no major items over which the dealer exercises any control. The resultant delivered price, therefore, is the factory list price plus the freight to the destination of delivery, plus the dealer's conditioning costs. The conditioning costs of new cars it should be noted are only a small fraction of the total consumer price, namely 1% to 3%. Even though we might admit that the dealer controls the amount of this conditioning cost, it must at the same time be admitted that such a small amount can in no way control the resultant consumer cost.

It can, therefore, be seen that since the Code permits the monetary reduction or elevation by the manufacturers, as well as the original establishment of the factory list price, that positively no price fixing is engaged in from the standpoint of the dealer. A truly free competition exists which

has the force and effect of keeping the new car selling price at the lowest possible point.

[fol. 134] No one make of automobile finds itself in the position of being considered by all prospective purchasers as the one and only best value. If the manufacturer of — car brings his price too high, then, obviously the manufacturer of — car in the same price class will immediately enjoy the lion's share of the business.

This element, therefore, effects all prices established by manufacturers on their new motor vehicles, and does so, quite naturally under a free com-etition with the public interest fully protected.

Since the dealer has nothing whatever to do with the establishment of the price of the new motor vehicle and since this Code in no way affects the establishment of such price, therefore, no price fixing is condoned in this Code within the true meaning of the term.

Monopoly

Monopolistic practices are impossible in connection with this Code by reason of the free competition which exists in connection with the establishment of new car selling prices and further by reason of the fact that no single manufacturer controls the source of supply of the commodity—new motor vehicles.

Each manufacturer is a free com-etitor of the other and any tendency toward price fixing detrimental to the public on the part of a single manufacturer or group of manufacturers is quickly met through the economic and competi-[fol. 135] tive forces of competition from those manufacturers willing to sell at lower prices. Thus, the public interest is entirely protected.

If the charge of monopoly is directed at those provisions of this Code pertaining to used car allowance, it should be considered from the angle of all basic elements which can enter into creating the monopoly.

First, the source of supply of the commodity is in no way controlled by the dealers. Addressing this point to the commodity termed used automobiles, it must be realized that the automobile dealers in no fashion control the source of supply of used automobiles which are to be sold to purchasers of used automobiles.

If monopoly is charged outside of control of the source

of supply, then it could only fall on the question of price control of the supply.

The automobile dealers have no means of controlling the price at which used automobiles may be sold to buyers of such vehicles.

In the dealer's Code no attempt is made to establish what price must be charged when selling (either as a maximum or a minimum) the commodity—used automobiles.

If, therefore, monopoly does not come into this Code through control of the source of supply, or through control of the prices of such commodities, the Code cannot be charged with such a factor.

The Code, in no manner, controls or effects the price at which each dealer may individually sell each and every [fol. 136] used motor vehicle which comes under his ownership.

The automobile dealer can be likened to the arterials between the source of supply and the market, but can positively not be charged with being more than one of a vast number of arterials.

In the oil fields we might assume that the source of supply of oil lies at the casing head. There are various ways of bringing this commodity to the market. One method may be tank cars over railroads. Another method may be truck tankers and another a pipe line.

Each has the right of establishing how they shall charge for the taking of this article to the market, and should the producer determine to pass his product through a particular arterial, the owner of such pipe may stipulate at what cost he will perform.

In the instance of the movement of used motor vehicles from the original owner, or source of supply, to the new owner or used car buyer, the automobile dealers' used car department is only one of many arterials. If it becomes the choice of the seller of the used motor vehicle to pass his product through the hands of the dealers to the ultimate consumer, then it, of necessity, becomes the dealers' inherent right to determine upon what basis he will handle the transaction. In no way is the purchaser of a new car, who at the same time desires to dispose of his old car prevented from making such disposal of his old car without the service of the automobile dealer.

[fol. 137] The automobile dealer, therefore, is merely

offering his service to the buyers of new cars and which service may be declined or accepted at the new car buyer's discretion. In this service, the automobile dealer assumes many risks and great liability through his acceptance of this used motor vehicle as part payment in lieu of cash for new merchandise for which he has already paid cash. He is without definite knowledge that he may sell it to anyone at a price as great as the amount of his allowance. Furthermore, in connection with the sale of this used motor vehicle, he must maintain his name and reputation as a fair merchant, while at the same time, he is forced quite often to extend credit over many months which oftentimes is attended with severe losses, which cannot be foreseen.

This dealer is further confronted with the absolute necessity (if and provided he is of honest intentions) of selling this used car at a fair and proper price commensurate with its value in order that the greatest number of his customers out of the total continue their confidence in his integrity as a merchant. The dealer has only slight knowledge of the condition of this used motor vehicle, at the time he accepts it in trade and even at the time he sells it, since it is physically impossible to predetermine whether a used motor vehicle will perform satisfactorily. Therefore, in the maintaining of his name and reputation he is oftentimes forced to make additional repairs after the vehicle has been tested out by a new user.

On page 16 of his affidavit, Mr. Spielman states;

[fol. 138] "By actual tabulation, the complainant has actually lost between 170 and 180 sales of automobiles which were later consummated by other dealers at prices prohibited by code regulation, the loss to complainant in dollar volume being well in excess of $100,000.00 in sales."

By this statement, Mr. Spielman speaking for the complainant, intimates that the only reason a prospect would purchase from any other dealer is because the other dealer offered more money. Mr. Spielman does not submit evidence of any one of these one hundred and eighty Code violations. We are unable to find any record of a single violation reported by the complainant to the N. A. D. A. or to the Code Authority.

It is the usual alibi of a dealer or salesman, when a sale is lost to a competitor, to immediately say that the other

dealer allowed more money Dealers or salesmen will never admit that they were outsold by some other dealer or salesman.

The most natural thing for a prospect to say to the salesman from whom he did not buy, when questioned, is that he got a better deal elsewhere. Many prospects are not brutally frank enough to state to the dealer or salesman that after contacting them, they either did not like them personally, or that they disliked their place of business, or that the contact they had with the firm did not lend confidence to them.

On page 16 of his affidavit, Mr. Spielman states:

[fol. 139] "The irony of the situation is impressive. Honest men, seeking out law violators, so that they might, in fact, receive an honest and true value for their property. Think of it, honest business men, urging other men and institutions to flaunt the law, so that a transaction involving the honest exchange of values, might be truly consummated.

We admit that it is difficult to picture an honest man, asking other men to violate a law, and particularly a law that has no penalty to the buyer. Mr. Spielman, however, does not disclose how the layman not in the automobile business can accurately determine the true value of a second hand car when 75% of the dealers themselves are unable to do so without the aid of exchange of price information.

He might have stated that he might not have been able to give the prospect what he would like to get for his used car, as it has not been an uncommon occurrence in the past, as well as today, for prospects to demand prices for their used cars amounting to twice what they were actually worth.

We make the assertion that the prospects themselves know the exact amount their used cars were worth is ridiculous, for up until the Official Code Book was published, there had never been accessible to either dealers or the public, any accurate report of what used cars were selling for. A used car is worth only what the buying public will pay for it, and not what the owner would like to get for it.

I have read the affidavits of Edna Sperl Burke, Harold Perfit and Alexander J. Hussell, duly sworn to the 21st day of July, 1934, and the affidavits of Henry Caplan and

[fol. 140] George Shapiro, verified the 23nd day of July, 1934.

I deny each and every allegation contained in each of said affidavits with respect to customer's refusal to accept the so-called "average" price for their used cars for trade-in purposes for reasons herein stated.

I further deny the allegations wherein the said effients recite that they lost customers because they could not pay the alleged actual value of their used car on a trade-in, and that the Code has a decided "unwholesome effect upon any dealer."

It is difficult for any dealer to state why he has lost a sale, and therefore, I question the statements of the said effients that they have lost the number of sales set forth in their respective affidavits due to the fact that they could not pay more than the Guide Book price for the used car.

Wherefore, I respectfully pray that the complainant's motion be denied.

Subscribed and sworn to before — this —— day of August, 1934. —— ——.

[fol. 141] EXHIBIT "A" TO AFFIDAVIT

National Automobile Dealers Association

We desire to express our sincere regret for the form letter which you received recently with reference to certain sales reports which were questioned by the Compilation Department and returned to you. This letter was unnecessarily abrupt, although unintentionally, and in issuring it we had in mind the necessity of obtaining certain positive reactions.

In compiling sales averages for the Official Guide, we received numerous complaints from dealers that the sales figures were extremely high and apparently inflated. In order to determine to what extent this might be true, it was decided to pick out certain sales reports from the records and return them to dealers.

In practically every instance we have received replies from the dealers advising that the sales reports were authentic and correct as submitted to us. This was the information we desired to obtain.

All sales reports received, including those returned, have been used in compilation, the only exceptions being in cases where the information was incomplete and the sale could not be traced to a definite body style. In such instances, which were comparatively few, the reports were returned to the dealer with the request for the necessary information, and upon return, they were then included in the compilation. We do this for the protection of the dealer and to insure accuracy so far as humanly possible.

Naturally, in a task of this size, particularly in the initial stages, there will be errors both of omission and commission. We are striving however to make the Official Guide a valuable working tool for the entire dealer body.

We desire to thank you for your prompt reply to our recent letter and again express our regret for having unnecessarily disturbed you, for which we trust you will accept our apologies.

Very truly yours, W. E. Blanchard, National Automobile Dealers Ass'n.

WEB-er.

[fol. 142] EXHIBIT "B" TO AFFIDAVIT

Excerpt from N. A. D. A. Bulletin, Dec. 11, 1933

"Our Sincere Apologies"

In view of complaints from dealers, who were instrumental in setting prices used in the first edition of the Official Guide, that the average sales prices listed were entirely too high, it was decided to test by question a certain number of sales reports to dealers in an effort to find out to what extent sales reports were being scrutinized by the dealers. This test was poorly handled in some cases; this we deeply regret.

Unfortunately, the Statistical Department in carrying out the task issued a form letter which was both inaccurate and unnecessarily abrupt, although it was entirely unintentional. It was our desire to obtain very positive reaction from dealers on this subject, and we are glad to say that in practically all instances, dealers to whom these reports were returned, have replied stating in no uncertain

terms that the reports they supplied to the Association were correct in all particulars. This was the information we desired to obtain, and in all cases the original reports were used.

The Association is interested only in publishing an Official Guide which will serve the great body of dealers thoroughly and without discrimination. We are rendering purely a reporting service and cannot be influenced by the demands of individual dealers or groups of dealers who may feel that their particular product is being discriminated against. Necessarily, in the preparation of the first issue of the Official Guide, which was a tremendous task, mistakes were bound to occur. However, these are being rectified and it is believed that the future issues of the Official Guide will reflect accurately conditions in the respective Districts.

May we again express our apologies to those dealers who received the form letter referred to and assure them that we had no thought in mind other than to protect their interest.

[fol. 143] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF K. J. AMMERMAN

DISTRICT OF COLUMBIA,
City of Washington, ss:

K. J. Ammerman, being first duly sworn, deposes and says:

I am a Deputy Arministrator in the National Recovery Administration, Washington, D. C., and was appointed Assistant Deputy Administrator by the Administrator on August 4, 1933. October, 1933, I was appointed Deputy Administrator to fill the vacancy created by the transfer of Col. R. W. Lee. I have been directly in charge of the administration of the Code for the Motor Vehicle Retailing Trade from October 1, 1933, until on or about July 26, 1934.

I received a degree in Mechanical Engineering from Lafayette College in 1916; for three years worked in the

automobile manufacturing and aircraft engine manufacturing department of Simplex Auto Co., a division of Wright-Martin Aircraft Corporation; I was a pilot in the United States Air Service in 1917 and 1918, with the rank of Second Lieutenant; for six years I was selling and sales manager of the Newark Branch of the Packard Motor Company; for three years I was assistant to the President of the American Car and Foundry Motors Company; I was sales [fol. 144] manager for Comet Engine Corporation one year and spent three years in Investment and Banking work.

Affiant appeared in official capacity and presided over the public hearing which was held September 18, 1933, for the purpose of preparing a Code of Fair Competition for the Motor Vehicle Retailing Trade, and is familiar with conditions in that industry and the circumstances which lead to the approval of the Code on October 3, 1833. Since the approval of the Code to July 26, 1934, I have been in charge of its administration and am fully acquainted with all matters pertaining thereto. My knowledge of the conditions existing in the Motor Vehicle Retailing Trade, which are set forth in this affidavit, is based, among other things, upon my own general knowledge, the testimony adduced at the public hearing, statistical and economic information furnished me and conferences with dealers representing both employers and laborers.

The automobile industry in the United States has developed, in the period of 38 years, from a minor industry to one that now comprises a position in the trade channels of the country that is exceeded today only by the retail distribution of food to the consumers.

In 1895 four motor vehicles were registered in the United States and at that time an automobile was considered a luxury. In 1930 the industry had developed to a point where the registration of motor vehicles is shown to be 26,545,281, and instead of being a luxury an automobile today is considered a necessity. It is vitally important to the conduct of every business enterprise in the United States. It is responsible for the development of the State, and is directly or indirectly responsible for employing one person out of every eleven workers.

[fol. 145] The automobile industry is divided into two distinct divisions, each considered a separate industry, but each dependent upon the other to a large extent: the

automobile manufacturer who manufactures and produces new cars and the motor vehicle retail dealer who distributes to and services new motor cars for the consumer. Unless and until the distributing agency of the Motor Vehicle Industry is efficiently and profitably conducted the effect will be adversely reflected upon the automobile manufacturer.

In 1929 there were approximately 44,000 automobile dealers in the United States, 90% of whom were engaged in the sale of new motor vehicles as well as used cars. The remaining 10% were engaged exclusively in the purchase and sale of used cars. In 1929 the new and used car dealers net sales were in excess of $6,200,000,000. There were 44,000 proprietors with 330,617 full time employees and 11,413 part time employees. The actual payroll for this particular industry was $528,987,607.

When the United States found itself crippled with economic paralysis the automobile industry, and especially the retail division, suffered severely, therefore dealers attempting to protect their capital investment and to continue operation if possible on a percentage basis, sought to dispose of their commodities in whatever manner they could. They sought every competitive business advantage, and many went so far as to deal with customers on the shady side of legitimate transactions. Because of the reduction in earnings the general public was not in a position to invest large sums of money in new or used machines. Their demand was for a lower priced car and, whenever a used car was traded in on the purchase of a new motor vehicle, the consumer usually demanded an amount in excess of the actual value of the used car he owned. Believing, as many [fol. 146] dealers did, a volume of business would increase their profit, they acceded to the demand of the general public and in their desire to complete a sale of a new motor vehicle very often granted an allowance on an old car which was far in excess of its true value, and when resold by them, they of necessity took a heavy loss. These competitive abuses continued until approximately 90% of the automobile dealers in the United States were either bankrupt or in such a financial condition that the period of their active business life would not exceed more than five or six months. Unscrupulous persons attempting to effect a profit out of the distressed condition of the trade worked

upon the harassed dealers and were able to purchase many cars and divert them from their normal channels to illegitimate channels and thus affected, to a large degree, those who were attempting to stabilize the industry at a personal loss. This decline continued to a point where, the capital investment in 1932 equalled approximately one-third of the capital investment of 1929. Employees who had depended upon this industry for livelihood found themselves without jobs. Some industries, dependent to a large extent upon the automobile industry as a consumer, were forced into bankruptcy, and compelled to refuce the number of employees because the demand for their goods had fallen and profits abolished.

In 1929 over 5,600,000 new motor vehicles were sold by manufacturers at a valuation in excess of $3,500,000,000. In 1932 this figure dropped to a trifle over 1,400,000 cars at a valuation of fraction over $793,000,000. This is shown to be a drop of approximately 75% in volume of business and value of sales. The same percentage is reflected in the retail trade showing that 75% fewer cars were sold in 1932 than 1929, and the value of those cars were reduced approximately 75%. In 1932 there were [fol. 147] employed 87,891 fewer people, which was approximately 26% of those employed in 1929. The average hourly wage rate for employees had fallen approximately 47% in comparison to the wage rate paid in 1929.

In an effort to prevent a complete collapse of business activities jurisdictions, state and local governments passed legislation attempting to protect the employers' business and prevent reduction in the wage rate of those few employees retained. This proved to be ineffectual. The control extended only to the borders of the state. Rather than improving conditions, the legislation imposed a penalty upon those operating in the jurisdiction of the legislative body. Many dealers and associated organizations removed themselves from that jurisdiction and operated in sections not so controlled. In this manner they disposed of all employees associated with them in the conduct of their business and re-employed a minimum of help in their new locality. The communities were affected. Depending to a large extent, as many communities did, upon various retail organizations within their boundaries they naturally found that when retail dealers left the community, they left

behind them many individuals unemployed, many stores vacant, reduced income from taxes, loss business for banking and credit institutions, and a general reduction in business activity and development within the community itself.

In 1929 more than $75,600,000 was paid by the retail automobile dealer- for rent or leases on the premises occupied by them. In 1932 the reduction was in proportion to the per cent of reduction in sales.

That automobile retail dealer, although attaining a high degree of importance in the trade and commercial life of the country, is to some extent different from the majority of industries involving so great a capital and upon which [fol. 148] so much depends. The automobile dealer is not located in definite areas, on the contrary he is found in the largest towns and in the hamlets, in every state and every county, and to a large degree in every community in the United States. He must be so located because of the exigencies of his business for he is not alone a salesman or a sales agency, but he services and repairs for the consumer the commodity he sells.

The Retail Motor Vehicle trade is one upon which many other industries are primarily dependent for their existence, and an industry upon which millions of persons are dependent for employment. It, furthermore, is an industry upon which the Federal Government, State, County and local government depend to a large extent for tax revenue.

Every state in the United States supplies materials used in the automotive industry, and employs directly or indirectly over 4,000,000 persons, and as has been previously stated, this includes one out of every eleven gainful workers. The automobile industry ranks first as a consumer for iron and steel; and as a consumer of certain commodities such as gasoline, rubber, plate glass, nickel, lead, mohair and upholstery leather, it exceeds by far its nearest competitor. It uses approximately 14.5% of the lumber used in the United States. It is responsible for the consumption of more than 85% of the gasoline consumed and more than 57% of the lubricating oils.

The destruction of the retail trade, as reflected in the motor vehicle factories, may be described to some extent by showing that in 1929 there were employed 427,459 employees receiving $775,478,810 in wages, while in 1932 the

number of employees was reduced to 229,800 and their wages reduced to $282,929,203. The capital investment in automobile manufacturing was reduced from over $1,950,-[fol. 149] 000,000 in 1929 to approximately $1,490,000,000 in 1932. This figure reflected in the manufacturing of automobiles ultimately reflected a reduction in employment and capital investment in those commodities dependent upon the automobile industry as a principal consumer of its goods.

The Motor Vehicle Retailing Trade employs a greater percentage of skilled help in its sales and mechanical departments and is indirectly responsible for employing more skilled help in the conduct of related trades than any other industry.

Through proper distribution, this particular industry has developed miraculously since it first established itself in 1895. Because of its tremendous size, its imports in trade, the huge amount of capital invested, the number of employees for which it is responsible, the industry has invited certain classes of persons who seek to profit through illegitimate means. Prior to 1929, when competition was not a large factor, the legitimate dealer was hardly affected by transactions conducted through "bootleg" dealers, and the "bootleg" dealer was notable to divert a sufficient percentage of business from the legitimate channels to affect the legitimate dealer.

When the trade was backed to the wall; when the members of the industry were faced with bankruptcy; the employees faced with loss of their jobs and the remaining few with a reduction in pay; when revolt was in its ranks; when the industry's standards were repudiated by those who entered the *the* trade during this critical period and were not alone satisfied to conduct their own business illegitimately, but invited others to participate and rally under its folds, and by standing together in dishonor, supporting each other in perpetrating a shame which was too much to face alone; when normal credit operations were dissipated; when the economic consequences were never considered in [fol. 150] "putting over a deal"; when profits were forgotten to attain volume; when every attempt to stem the tide of financial ruin proved disastrous and when voluntary sacrifices of a few were to no avail—the members of this dustry turned to the Federal Government for aid and assisted in preparing a program for recovery.

Local and state dealers organized and subsequently there was delegated power to a national organization to present to the National Recovery Administration a proposed program or Code. They accepted, as a necessary condition, certain regulations, in order to obtain benefits, some of which have already been realized. There was a specific regulation to protect members from the vicious habits of past trading activities. Effort was made to put operations on a sound business basis. Unless dealers realized a profit on cars handled, the independent dealer was doomed.

The industry itself found it impossible to control their own activities through organizations. They were slowly but effectively becoming disorganized.

Governmental supervision was the only means of saving the Motor Vehicle Retailing Industry. The industry was fast dropping from the primary trade position it had attained over a short period of years. It was losing the prestige it had struggled to build. It was tragic to record and recognize these facts, yet it was true.

The complete and utter breakdown of this industry, which brought it to the verge of bankruptcy and disorganization is evidenced by the impossibility of the industry to become self-governing without government support. Scattered as it was throughout the entire country, effective state legislation was impossible. The conditions and abuses which had to be remedied were not confined in their effort to any one locality since the industry was national in scope. [fol. 151] State legislation merely intensified the situation. Piece-meal diversified regulation was therefore no answer. Only the Federal Government was in a position to act promptly. The necessary comprehensiveness of any kind of regulation called for a national control that would deal effectively with all the complex relations between the industry and the consumer. The Federal Government was in a position to command the services of experts who had been trained to deal with the complexities of adverse economic conditions and whose knowledge of the matters and intricacies of business methods would enable them in their position to envision the economic picture as a whole and to effectuate a plan of regulation that would have been impossible if attempted by those whose commends cannot extend beyond state boundaries.

The past system of dealing in volume in the sale of new

cars rather than in profit was an operation that showed a tremendous loss to the dealer in both dollars and percentage.

To protect themselves from this, the majority of members of the industry proposed a uniform system by which the actual sale price to the consumer of new cars could be determined on an equitable basis.

Probably the greatest evil confronting the trade was in connection with the acceptance of a used car as a credit allowance, in excess of its actual resale value, on the purchase of a new car. In the past the only methods of determining the resale value of a used car accepted in trade on a new car was on the basis of individual opinions, or by the use of appraisal books. These appraisal guides as published, were based on unsupported reports furnished by some of the dealers. In this manner they were able to establish an allowance price to suit their own desires, and the consuming public was left with no available remedy except [fol. 152] to deal with those men in the manner prescribed by them, to their mutual detriment. The industry felt that this was discriminating against the customer and ruining the dealer. In an effort to abolish this evil, protect the dealer, protect the public, and insure an adequate return on sales, the dealers proposed a system by which the consumer alone established the allowance or appraisal price on used cars sold or traded in to retail dealers. This was by separating the nation into definitely identified trading areas. All dealers within that trade area furnished an organization, named by the dealers, with sworn reports showing the exact sales price received by them on each separate make and model of car. By using these figures, and in the manner prescribed by the Code, an average was struck determining the average used car allowance granted by dealers during a given period of time. In this manner the consuming public and not the dealer determined the maximum price to be allowed when the used car was used as a medium of exchange.

Accuracy in determining the correct appraisal price on used cars is essential not only to the dealer but becomes of the financial position these appraisal prices take in the community. Local and state governments have, in the past depended, and will continue to depend upon the appraisal value published, in determining the value of a used car for taxation purposes. Credit organizations, insurance com-

panies, banks, and other financial institutions accept the published valuation of a reputable concern as a true and correct valuation of the car. When this valuation is determined through subterfuge or some ingenious manner by persons financially interested it can be readily seen that financial activities may be affected to a large extent. When it is shown that the motor tax was 10.7% of all taxes from all sources in 1932, proper determination of true valuations is essential.

[fol. 153] The used car market formerly was a minor activity among the retail dealers, but today is of major importance.

Without having definite figures to show the trend of business today it is impossible to state definitely the actual value of the Code as adopted by this industry, and under which it is now operating. Surveys conducted by various agencies have definitely proven that the industry has benefited to a large extent because of the Code. They have been operating under its provisions and increased volume of sales and are now reclining profit on capital investment. Bankruptcy has been decreased; failures are practically unheard of; nearly every unemployed member of the trade has been reemployed; vacant stores have been reoccupied; credit has been established, and in general the entire aspect is one of glorious future.

A review of statistics showing the economic trend of the country for the last year will show definitely the effect of an efficient organization in the retail Motor Vehicle trade. The industry itself has absorbed thousands of unemployed and has been directly responsible for absorbing many thousands more. Manufacturers of automobiles have added to their personnel. Organizations dispensing gasoline and motor oils have increased the number of employees and increased the living wage paid them. The State and Federal Governments have employed millions of persons on improving local, State and Federal highways to accom-odate motorists, and to improve transportation facilities for the farmer and merchant in delivering their goods from the farm to the city, and from one locality to another in interstate commerce. Rail carloads of automobiles and automotive parts have increased. The use of motor trucks in interstate commerce has multiplied and is becoming more important every day. Revenue from taxes on new automobiles, gasoline, oils and various accessories has increased.

[fol. 154] When it is realized that 75% of the State highway bonds are passed on special motor taxes, the effect of this increase may be readily appreciated; and when it is understood that 72% of the automobile industry is carried on in the United States and these machines are distributed thru the retail dealers, it is not difficult to picture the effect of increased activity in this line.

K. J. Ammerman.

Subscribed and sworn to before me this 15 day of August, 1934. Lyman M. Mare, Notary.

(74593) Certificate of Frank E. Cunningham, Clk. of Sup. Court, Washington, D. C., that L. M. Mare is Notary Public of said District.

[fol. 155] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF K. J. AMMERMAN

DISTRICT OF COLUMBIA,
City of Washington, ss:

K. J. Ammerman, being duly sworn, deposes and says:

The President of the United States, pursuant to Title I, Section 2, of the National Industrial Recovery Act, on June 16, 1933, by Executive Order, appointed Hugh S. Johnson as Administrator for the Industrial Recovery and authorized him to appoint the necessary personnel to conduct hearings and do such work as would be necessary to effectuate the policies set forth in Title I of said Act. A copy of this Executive Order (No. 6173) is attached hereto, marked Exhibit "A" and made a part hereof. (Subsequent Executive Orders Nos. 6205-A and 6205-B, relating to the organization of the National Recovery Administration, are attached hereto, marked Exhibits "B" and "C" respectively, and made a part hereof).

Pursuant to the above Executive Order No. 6173, the [fol. 156] National Recovery Administration was established as an agency of the Federal Government for the

purpose of assisting the President in the administration of Title 1 of the Act. The Administrator is directly in charge of the agency, and immediately under him are Division Administrators. The various industries of the country have been grouped under certain generic classifications, and one or more of these groups are assigned to each Division Administrator, who has charge of the proceedings by which application for the Codes of Fair Competition for industries within these groups are received and heard, and for the administration of the name.

I was appointed Assistant Deputy Administrator on August 4, 1933; October 1, 1933, I was appointed Deputy Administrator to fill the vacancy created by the transfer of Col. R. W. Lea. I am directly in charge of the administration of the Motor Vehicle Retailing Trade Code, from October 1, 1933, to July 26, 1934, and I am now thoroughly familiar with the proceedings taken in connection with the administration of the Code of Fair Competition for the Motor Vehicle Retailing Trade, and with all Administrative and Executive Orders.

I. Application for Code

August 30, 1933, an application for Code of Fair Competition and proposed Code of Fair Competition for the Motor Vehicle Retailing Industry was submitted by the National Automobile Dealers Association, through a Committee appointed by them for that purpose, an organization shown to represent approximately 75% of the members of that Industry (now representing approximately 96% of members of the industry). The proposed Code was referred to members of the industry and local organizations [fol. 157] interested in the Code, and revised by the National Automobile Dealers Association in accordance with suggestions submitted. September 7, 1933, a proposed Code approved by representative members of the Association was filed with the National Recovery Administration, the filing of the proposed Code was announced by a Press Release #679, which was issued on September 5, 1933. A copy of the release is attached hereto, marked Exhibit "D" and made a part hereof.

II. Notice of Hearing

A public hearing on the proposed Code was set for September 18, 1933, and Notice thereof was mailed to all per-

sons, firms and organizations known to be interested. A copy of said Notice was also placed in all United States Post Offices and inserted in Trade Journals. A copy of the Notice of Hearing is attached hereto, marked Exhibit "E" and made a part hereof.

Notice of said hearing was also announced by general Press Release #679 of September 6, 1933, which is attached hereto, marked Exhibit "D", and made a part hereof.

III. Public Hearing

A hearing upon the proposed Code was held on September 18, 1933, in the Garden Room of the Mayflower Hotel, Washington, D. C., with Deputy Administrator R. W. Lea presiding. The meeting was attended by representative delegations from the industry and by representatives of labor organizations, including those of employees in the industry. At this public hearing all provisions of the [fol. 158] proposed Code were thoroughly discussed. All representatives were given every opportunity to be heard and afforded ample time to discuss any feature of the proposed Code. Briefs from representatives not attending were read into the record.

It having been the general trade practice of members of this industry to accept used motor vehicles in trade on new cars at an appraisal price determined by the individual dealers, using as a guide one of the numerous publications issued for that purpose, and it having been a general trade practice of members of this industry to retail new motor vehicles at list price plus definitely established handling charges, the Association incorporated in the Code Trade Regulation Provisions to protect members of the industry from vicious habits of certain classes of dealers who had established themselves in business and were operating during the chaotic period prior to the adoption of the Code.

To stabilize this medium of exchange, there were incorporated in the Code provisions establishing the method of computing the price all-wence on used cars and creating one organization to be responsible for the preparation of a publication of the official appraisal book for distribution to members of the industry.

Facts presented in favor of these provisions and facts presented in objection to these provisions were heard and considered.

IV. Revised Code Proceedings

After adjournment of the public hearing, representative [fol. 159] groups within the industry held a series of conferences with the administration to discuss the controverted questions arising out of the public hearing. At these conferences the matter of used car allowances and appraisals and trade regulations were thoroughly discussed and briefs, letters and telegrams relative thereto were read and considered. It was the opinion of a majority of the members of the industry and the administration that since it was an established policy of the industry to operate under similar regulations they should be included in the Code of Fair Competition. The revised Code, which met with the approval of the sponsoring association and a large percentage of the members of the industry, was then presented for final hearing.

V. Approval of the Code

On September 29, 1933, Hugh B. Johnson, Administrator for the National Recovery Administration, forwarded the proposed Code, as revised, to the President, with a letter of transmittal recommending the proposed Code be approved.

On October 3, 1933, the President approved the Code of Fair Competition for the Motor Vehicle Retailing Trade. A copy of the Code as approved, which contains a copy of the Administrator's letter of transmittal and the Executive Order approving the Code is attached hereto, marked Exhibit "F", and made a part hereof.

VI. Code Administrative Bodies

Pursuant to Article V of the approved Code, a State Advisory Committee for the metropolitan New York area (considered a State for Administrative purposes, Article [fol. 160] V-A1 was duly created in accordance with the method of selection therein provided and approved by the Division Administration, a copy of the letter approving the method of selection and members of the State Advisory Committee for the metropolitan state district of New York is attached hereto, marked Exhibit "G", and made a part hereof.

Pursuant to and in accordance with Article VI of the Code and Amendments to the Code, approved April 20,

1934, there was established an Emergency National Committee, selected in accordance with the method set forth in Article IV of the Code.

A copy of the Amendment, and a copy of Executive Order No. 6543-A, dated December 30, 1933, is attached hereto, marked Exhibit "H", and "I" and made a part hereof.

Pursuant to and in accordance with Article VIII of the approved Code, a National Control Committee was created, the method of selecting membership for said Committee being set forth in Article VIII of the Code.

In accordance with and pursuant to provisions of Article IV of the Code the United States was separated into certain districts, identified as market areas. For each such district there is established, from statistics obtained from dealers operating within that district, fair used car allowances or appraisal values, such values being established and made public in accordance with Article IV and Article VII of the Code. The City of New York is located in Market Area No. 2. An extract from an official publication containing used car allowance price lists or appraisal values is attached hereto, marked Exhibit "K", and made a part hereof.

[fol. 161]

Conclusion

At all times from the date of the submission of the first Code, through the final approval thereof, and the amendments thereto, the Administrator has afforded all members of the Industry the fullest opportunity to be heard on any of the provisions of the Code or its amendments. The Code, as finally approved on its composite results, represents practically the unanimous approval of the members of this industry and of the representatives of labor. The Code as approved seeks to provide self-government of industry with complete and adequate safe-guards in the form of administrative checks and supervision. The Code itself, as well as the National Industrial Recovery Act, provides, in the form of administrative remedies, complete and adequate public protection against abuse of power by the self-governing instrumentality, the Code Authority.

F. J. Ammerman.

Subscribed and sworn to before me this 15 day of August, 1934. Lyman M. Mare, Notary.

(74592) Certificate of Frank E. Cunningham, Clk. of U. S. Sup. Court, Washington, D. C., that L. M. Moore is Notary Public in local districts.

[fol. 162] EXHIBIT "B" TO AFFIDAVIT

Executive Order

Administration for Industrial Recovery

Pursuant to the authority vested in me by Title I of the National Industrial Recovery Act, approved June 16, 1933, and in supplement to my Executive Order of June 16, 1933, appointing Hugh S. Johnson to be the Administrator for Industrial Recovery under Title I of said Act, and appointing a Special Industrial Recovery Board, I hereby authorize the Administrator, subject to the general approval of the Special Industrial Recovery Board, to appoint the necessary personnel on a permanent basis, to fix their compensations, and to conduct such hearings and to exercise such other functions as are vested in me by Title I of said Act, except the approval of codes, or making of agreements, or issuance of licenses, or exercise of powers conferred in Section 3 (c), Section 6 (c), Section 8 (b), Section 9, and Section 10.

Franklin D. Roosevelt.

The White House, July 15, 1933.

(No. 6205-A.)

[fol. 163] EXHIBIT "A" TO AFFIDAVIT

Executive Order

Administration for Industrial Recovery

Pursuant to the authority of "An Act to encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes", approved June 16, 1933, and in order to effectuate the policy set forth in Title I, Industrial Recovery, of said act:

1. I hereby appoint Hugh Johnson to be the Administrator for industrial Recovery under said title I of said act.

2. I hereby appoint a Special Industrial Recovery Board to be composed of the following members: The Secretary of Commerce, Chairman; the Attorney General; the Secretary of the Interior; the Secretary of Agriculture; the Secretary of Labor; the Director of the Budget; the Administrator for Industrial Recovery; the Chairman of the Federal Trade Commission.

The Administrator during the ensuing 30 days shall have authority, subject to the general approval of the Special Industrial Recovery Board, to appoint the necessary personnel on a temporary basis to conduct hearings and to do such other and necessary work as authorized under title I of said act.

Franklin D. Roosevelt.

The White House, June 16, 1933.

(No. 6173.)

[fol. 164] EXHIBIT "C" TO AFFIDAVIT

Executive Order

Pursuant to the authority vested in me by Title I of the National Industrial Recovery Act, approved June 16, 1933. I hereby prescribe the following regulation, modifying any previous order inconsistent therewith;

Any code of fair competition approved by me shall be deemed in full force and effect on the effective date as stated in the code: but after the approval of a code and as an incident to the immediate enforcement thereof, hearings may be given by the Administrator or his designated representatives to persons (hereby defined to include natural persons, partnerships, associations or corporations) who have not in person or by a representative participated in establishing or consenting to a code, but who are directly affected thereby, and who claim that application of the code in particular instances are unjust to them and who apply for an exception to, or exemption from, or modification of the code. Such persons so applying within ten days after the effective date of the code shall be given an opportunity

for a hearing and determination of the issues raised prior to incurring any liability to enforcement of the code, and the Administrator shall, if justice requires, stay the application of the code to all similarly affected pending a determination by me of the issues raised.

Franklin D. Roosevelt.

Approval recommended: Hugh S. Johnson.

The White House, July 15, 1933.
(No. 6205-B.)

[fol. 165] EXHIBIT "D" TO AFFIDAVIT

National Recovery Administration

Release #679

Immediate Release, September 8, 1933.

Motor Vehicle Retailing Trade Code

The National Recovery Administration today announced that public hearing will be held Monday, September 18, in Department of Commerce Building on the Motor Vehicle Retailing Trade Code filed by the National Automobile Dealers Association, claiming to represent 75% of the total volume of the industry. Deputy Administrator W. R. Lea will preside.

The code provides a maximum work week of 45 hours, except for salesmen and watchmen, and 52 hours operation for place of business. Maximum hours do not apply to executives and managing employees receiving $25.00 a week or more, or to emergency workers, but in these cases the average over 6 weeks is not to exceed 48 hours.

Minimum wage is fixed at -15 a week in cities of over 500,000 population, scaled down to $12. a week in towns less than 2,500 population. Full time outside salesmen with unrestricted hours and on commission basis are guaranteed a drawing account of not less than $17.50 a week in cities of 500,000, scaled down to $10. a week in towns of less than 2,500. For mechanics, the minimum wage is 50 cents an hour unless below that rate on July 15, 1929, and in no case less than 30 cents an hour.

[fol. 166] EXHIBIT "E" TO AFFIDAVIT

National Recovery Administration

Release #679-A

Notice of Hearing: No. 99

September 5, 1933.

Motor Vehicle Retailing Trade:

The above industry, as represented by the National Automobile Dealers Association, claiming to represent 75% of the total volume of the industry, has submitted a proposed basic code of Fair Competition, copies of which are available at the office of the National Recovery Administration, Room 3316, Department of Commerce, Washington, D. C.

The Code for the National Automobile Dealers Association in its present form merely reflects the proposals of the above mentioned industry, and none of the provisions contained therein are to be regarded as having received the approval of the National Recovery Administration as applying to the Industry.

Notice is hereby given that a Public Hearing on this Code will be conducted by the Administrator, beginning at 10:00 A. M., Monday, September 18, 1933, in the Garden Room, Mayflower Hotel, Washington, D. C., and continuing until completed. An opportunity to be heard (either in person or by duly appointed representative either by appearance or by sending a written or telegraphic statement) will be given to persons or groups who show a substantial interest as workers, employers, consumers or otherwise, in the effect of any provision of the proposed code.

Those wishing to be here must comply with the following simple requirements:

(1) A written or telegraphic request for an opportunity to be heard must be filed before noon on Saturday, September 16, 1933, with the Administrator, Room 4034, Department of Commerce, Washington, D. C.

(2) Such request shall state the name of (a) my person seeking to testify in the hearing, and (b) the persons or groups whom he represents.

(3) Such request shall contain a statement setting forth without argument, a proposal; (1) for the elimination of a specific provision of the Code; or (*a*) a modification of a specific provision, in the language proposed by the witness, or (3) a provision to be added to the Code, in language proposed by the witness.

(4) At the Public Hearings, all persons are regarded as witness-, arguments may be filed, but oral presentations will be confined to factual statements only.

[fol. 167] (5) In the discretion of the Deputy Administrator in charge of the Hearing, persons who have not complied with the requirements of paragraph (1), above, may be permitted at any time prior to the close of the Hearing to file written statements containing proposals for elimination from modification of, or additions to the code supported by pertinent information or argument. Such written statements must be condensed as much as possible.

Public Hearings are solely for the purpose of obtaining in the most direct manner the facts useful to the Administrator, and no arguments will be heard or considered at this time. Representation of interested parties by attorneys or specialist in permissible, but is not to be regarded as necessary. Industry, workers and the consuming public will be represented by special advisers employed by the Government.

Hugh S. Johnson, Administrator. R. W. Lea, Deputy Administrator.

[fol. 168] EXHIBIT "G" TO AFFIDAVIT

NRA

National Code Authority

Motor Vehicle Retailing Trade

1010 Pine Street, St. Louis, Mo.

April 28, 1934.

F. W. A. Vesper, Chairman.
J. Reed Lane, Executive Secretary, 324 Munsey Building, Washington, D. C.

Mr. F. W. A. Vesper, Chairman, National Control Committee, Motor Vehicle Retailing Trade, 1010 Pine Street, St. Louis, Missouri.

DEAR MR. VESPER:

After examination of the evidence submitted by you the persons herein named are recognized as having been duly chosen members and chairmen of the respective State advisory Committees.

This recognition is based on the evidence submitted by you, which evidence has been returned for filing in your vaults, with the understanding that upon request it will be resubmitted at any time for further examination or for permanent filing in this office.

Very truly yours, (Signed) K. M. Simpson, Division Administrator.

[fol. 169] EXHIBIT "I" TO AFFIDAVIT

Executive Order

Delegating Further Functions and Powers to the Administrator for Industrial Recovery

Pursuant to the authority vested in me by and under the provisions of title 1 of the National Industrial Recovery Act, and in addition to the functions, and powers heretofore delegated to the Administrator for Industrial Recov-

ery, I, Franklin D. Roosevelt, President of the United States, do hereby order that the following functions and powers be, and they are hereby delegated to the Administrator for Industrial Recovery:

(1) The approval of codes of fair com-etition, with the exception of codes for major industries (being in general those industries normally employing in excess of 50.00 employees) as so classified by the Administrator for Industrial Recovery, and with the exception also any code of fair competition imposed under Section 3 (d) of said title of said act.

(2) The approval of any amendment or modification to, exception or exemption from, or elimination of any one or more provisions of any code of fair competition.

(3) Nothing herein contained shall be construed as amending any previous delegation of power to any other Department of the Government.

Franklin D. Roosevelt.

Approval recommended: Hugh S. Johnson, Administrator.

The White House, December 30, 1933.
(No. 6543-A.)

[fol. 170] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF RALPH EBBERT

CITY, COUNTY AND STATE OF NEW YORK, ss:

Ralph Ebbert, being duly sworn, deposes and says:

That he resides at 100 Carman Avenue, Lynbrook, New York.

That for the past fourteen years your deponent has been acting as manager of the Brooklyn Motor Vehicle Dealers Association.

That the said Association is a membership corporation organized under the laws of the State of New York comprising in its membership dealers engaged in the retail sale

of automobiles as well as dealers in accessories to automobiles.

That your deponent has the records of the Association under his supervision and control.

That the records of the Association show that the complainant, Spielman Motor Sales Co. Inc. has been a member of the Association since January 14th, 1925, and his active membership certificate number is 24, having been issued on November 13th, 1929. That complainant is still a member [fol. 171] in good standing to the date of the making of this affidavit.

That in the year 1933, your deponent caused various notices to be sent to all the members of its organization amongst the motor vehicle dealers. That notices were sent to all dealers of new motor vehicles in the counties of Kings, Queens, Suffolk and Nassau to the effect that a meeting would be held on July 19th, 1934, at the Garden City Hotel, Garden City, Long Island for the purpose of discussing a proposed Code for the Motor Vehicle Retailing Trade and expanding the Brooklyn Motor Vehicle Dealers Association so as to include dealers on Long Island, outside of Kings County, in an organization for Code purposes to be known as the Brooklyn and Long Island Automobile Dealers Association. That this notice of meeting was sent to the complainant herein.

That at this meeting the questions of the proposed Code were discussed and a Code then presented was unanimously adopted by the meeting, as well as a resolution expanding the membership of the said Brooklyn Motor Vehicle Dealers Association as aforesaid.

The next meeting was held at the Hotel St. George in Brooklyn on August 10th, 1933. Notices of this meeting were likewise sent to all Brooklyn new car dealers including the complainant herein. That at this meeting further provisions of the proposed Code for the said trade were again discussed.

At this meeting a representative of the Brooklyn Cham- [fol. 172] ber of Commerce spoke generally of Codes, the N. R. A. set up, and the Blanket Code then in effect.

That your deponent knows definitely that although David Spielman of said complainant received notice of these meetings, he did not attend to make any protest to the adoption of the proposed resolutions.

Your deponent further knows that at a meeting of the Board of Directors of the Brooklyn and Long Island Automobile Dealers Association, of which the said complainant is a member, there were designated three delegates to attend a District Advisory Committee meeting for the purpose of selecting its delegate to attend a meeting contemplated being held in St. Louis.

That the said delegate elected was one Theodore Southworth. That the said Theodore Southworth represented the said Brooklyn and Long Island Automobile Dealers Association and all the dealers in Brooklyn and Long Island at said meeting in St. Louis as well as in Washington subsequently. He also represented the other dealers in the Metropolitan New York District.

That the Brooklyn and Long Island Automobile Dealers Association has no record of any letters sent in protest of the Code of Fair Competition for the Motor Vehicle Retailing Trade from the said complainant.

Ralph Ebbert.

Sworn to before me this 15th day of August, 1934.

———.

[fol. 173] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HIRAM B. POPE

CITY OF NEW YORK,
State of New York,
County of Queens, ss:

Hiram Bates Pope, being duly sworn, deposes and says:

That he resides at 36 Rockrose Place, Forest Hills, New York.

That since 1916 your deponent has been affiliated with the Motor Trades Publishing Company, which for the past twenty-four years has been publishing weekly a magazine known as the "Automobile Topics," which is now considered as a trade authority in this industry.

That your deponent is the managing editor of this magazine and has for the past ten years been collecting statis-

tics and surveys with regard to the conditions of the industry, by preparing questionnaires, forwarding them to various dealers of the motor vehicle industry, receiving their returns, tabulating and compiling the composite figure so as to arrive at the true status of conditions at various times in the industry.

That the questionnaires when forwarded by your deponent are sent to dealers all over the United States, the [fol. 174] purpose being to get a distinct picture of the industry as a whole.

Also from time to time special questionnaires and data are secured in this fashion on pertinent questions in the industry from dealers.

That in an endeavor to determine conditions, and more particularly on or about June 12, 1934, your deponent forwarded a questionnaire to five hundred dealers distributed throughout the United States, both as to territorial location and representation with respect to the various makes of automobiles, as set forth in Exhibit A attached hereto and made part hereof.

This distribution of dealer names was effected according to a system which has been used over the past ten years in an effort to secure representative opinions constituting in effect a cross-section of the dealer viewpoint for the country as a whole.

Replies were received from forty-five states and the District of Columbia, and from representatives of twenty-nine different makes of car. Because some dealers represent only one make of car and others several makes of car, returns to the questionnaire represented four hundred and fifty dealer contracts. Three hundred and fifty-three replies were received, of which two hundred and sixty-eight were received from cities and towns of less than fifty thousand population, and eighty-five from larger places.

The percentages of answers to the various questions are as set forth in Exhibit B affixed hereto and made part hereof.

These answers to the questionnaire reflect definitely the following:

[fol. 175] Nearly 80% of the dealers replying directly to the said first question answered that the Code had improved their business. In view of the fact that the Code was introduced only six months prior to the issuance of the ques-

tionnaire the strength as well as the eloquence of the response is particularly significant.

As a result of the answers of the said 4th and 5th questions, and more particularly in Subdivision C of the said 5th question herein nearly 69% of the answers were in favor of more active enforcement against 6.2% answering negatively and 24.9% not answering at all, it is established that the preponderance of dealers are in favor of the Code and more rigid enforcement thereof rather than its abolition. If you disregard those who did not answer the question at all and merely focus your attention to those who answered yes or no, the preponderance shows about a 90% average of the dealers who answered being in favor of enforcement.

The question of the reasonableness of the existing Code of Fair Competition for the Motor Vehicle Industry can be gleaned from the 3rd question where by great preponderance of answers all dealers considered it fair not only to the dealer but also to the public.

All the foregoing information and tabulation is in the possession of your deponent.

I sent out once a month to a list of five hundred dealers, also representing a cross-section of the country, a green papered blank questionnaire in which I ask them what is helping their business, what is hurting it, what they consider the outlook for the next 30 days, and also some par- [fol. 176] ticularly confidential information as to the volume of their business, which I use in constructing an index figure which is widely recognized by the industry as an indicator of the state of trade.

Answers came in for my August 11, 1934, publication of the "Automobile Topics." The gist of these answers, compiled in the same fashion as was used in the questionnaire of June aforementioned, is that the Official Guide Book provided by the Code of Fair Competition for the Motor Vehicle Retail Trade, and more particularly therein mentioned in Article 4, Section 1 thereof, is somewhat belated in lowering the price of used cars in connection with the car's depreciation from month to month, more particularly so because of the new models that are being rapidly put upon the market by manufacturers.

A large number of dealers, exceeding more than a majority, believe that the prices listed in the Official Guide

Book are rather too high than too low. This information is gleaned not only from answers to this last mentioned green papered questionnaire but also from my conversation and contact with dealers in the Metropolitan New York area.

In all my surveys made weekly since December of 1933 no dealers have complained that the prices made mention of in the said Official Guide Book are not high enough. This points out pretty clearly that the average price arrived at from a compilation of sworn statements of the dealer, in pursuance to the Code, in arriving at the figures set forth for used car allowance, is a reasonable regulation of the trade.

[fol. 177] That for many years the firm of R. L. Polk Co. of Detroit, Michigan, has compiled data and issued reports with regard to passenger car registration. That they are today considered the authority for supplying information with regard to new car registration in the United States.

That your deponent, on behalf of the "Automobile Topics" magazine, has retained this service and has in its August 11, 1934, publication on pages seventy-two and seventy-three thereof, set forth in full the tabulation of this registration for all the states in the United States excepting New Jersey and Metropolitan New York, giving the number of registrations in each of the said states of the union of twenty-seven makes of cars.

The tabulation shows that for the first six months of 1932 a total of six hundred sixty-three thousand, six hundred and twenty-five (663,625) registrations of new cars were made; that in the first six months of 1933 there were six hundred eighty-two thousand, three hundred and sixty-seven (682,367) registrations of new cars made. For the first six months of 1934 there have been nine hundred ninety-five thousand, one hundred and twenty-one (995,121) registrations of new cars made. This substantially shows that the retailing business of this industry has advanced by leaps and bounds since the Code was adopted.

Wherefore, from all of which your deponent desires to advise this Court that the Code of Fair Competition for the Motor Vehicle Retailing Trade has been a source re-establishing the industry from its past chaotic condition. Should the Code be dispensed with, this industry would decline

and fall into the old cut throat methods of competition, chiseling, and eventually force the greater number of deal-
[fol. 178] ers into bankruptcy as well as create a large number of financial losses to those who might survive.

Hiram Bates Pope.

Sworn to before me this 15th day of August, 1934.
Alex Gente.

[fol. 179] EXHIBIT "A" TO AFFIDAVIT

"Test Poll" by Automobile Topics

Code of Motor Vehicle Retailing

(1) Has the automobile retail code improved your business situation? .....

(2) a. If so, in what way? .....
b. If not, why? .....

(3) Do you consider it fair?
a. To the public .....
b. To the dealer .....

(4) Is it being sufficiently enforced? .....

(5) If not, do you favor—
a. Its abandonment .....
b. Modification .....
c. More active enforcement .....

Remarks: .....

(No signature required.)

[fol. 180] EXHIBIT "B" TO AFFIDAVIT

"Test Poll" by Automobile Topics

Code of Motor Vehicle Retailing

	Yes	No	Blanks
(1) Has the automobile retail code improved your business situation?	270 (76.5)	75 (21.2)	8 (2.3)

	Yes	No	Blanks
(2) a. If so, in what way?			
b. If not, why?			
(3) Do you consider it fair?			
a. To the public	314 (89.0)	33 (9.3)	6 (1.7)
b. To the dealer	311 (88.1)	32 (9.1)	10 (2.8)
(4) Is it being sufficiently enforced?	63 (17.8)	278 (78.8)	12 (3.4)
(5) If not, do you favor—			
a. Its abandonment	31 (8.8)	133 (37.7)	189 (53.5)
b. Modification	45 (12.7)	91 (25.8)	217 (61.5)
c. More active enforcement	243 (68.9)	22 (6.2)	88 (24.9)

Remarks:

[fol. 181] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF OSCAR P. PEARSON

CITY OF NEW YORK,
STATE OF NEW YORK, —
County of New York, ss:

Oscar P. Pearson, being duly sworn, deposes and says:

That he resides at 273 West 73rd Street, Borough of Manhattan, City of New York.

That your deponent is the manager of the Statistical Department of the National Automobile Chamber of Commerce, which is a membership corporation organized under the Laws of the State of New York, having its office at 366 Madison Avenue and 46th Street, in the Borough of Manhattan, City of New York.

That this Association comprises a membership of passenger car and motor truck manufacturers with the trade name of the product manufactured by them, as shown on Exhibit A made part hereof.

That the Association was organized in 1913, and that your deponent has been affiliated with this organization since 1921.

[fol. 182] That since 1919 the Association has issued an annual pamphlet known as the "Automobile Facts and Figures", reviewing each year's condition in the automobile industry. That the last issue, known as the 1934 edition, has already been published and distributed.

That this magazine is recognized as an authority throughout the United States, as setting forth authentically the tabulation of all compiled data therein mentioned.

That the facts hereinafter stated have been compiled under the personal supervision of your deponent in connection with the issuance of the 1934 edition of the pamphlet known as the "Automobile Facts and Figures."

That a resumé of this 1934 edition of "Automobile Facts and Figures" shows that the sales exports and production during the first five months of 1934 indicate that recovery is the outstanding characteristic for the early part of the year 1934; employment in the industry gained as the year progressed, and by May, 1934, approximated 1929 levels, while hourly wage rates exceeded the highest 1929 levels.

In fact, the 1933 May employment for N. A. C. C. members shows 99,343 employees while the 1934 May employment shows 206,965 employees. These facts are based on monthly reports received from manufacturers. The figures on employment cover hourly factory workers only and do not include the office and other salaried employees receiving more than $35.00 per week. These facts have been compiled from the manufacturers of automobiles who are members of our industry.

[fol. 183] That the monthly retail sales of motor vehicles in the United States for the calendar year 1933 and the months of January to June, 1934, both of the last months being inclusive, have been compiled by me. These figures are reported by automobile and truck manufacturers who in turn obtain reports from their respective dealers throughout the United States, and which figures are in the possession of the said National Automobile Chamber of Commerce. These figures; so compiled under my personal supervision, show as follows:

1933	Total Motor Vehicles	1934	Total Motor Vehicles
January	94,214	January	89,982
February	81,503	February	143,721
March	97,731	March	232,485
April	148,833	April	273,943
May	192,076	May	256,201
June	226,154	June	276,111
July	206,825		
August	213,279		
September	181,629		
October	158,573		
November	112,559		
December	69,471		
Total	1,782,847	6 months	1,272,443

Oscar P. Pearson.

Sworn to before me this 15th day of August, 1934. Einas R. Henderson, Notary Public, Bronx County, Clerk's #50. (Seal.)

[fol. 184] EXHIBIT "A" TO AFFIDAVIT

Passenger Car Manufacturers

Trade Name	Member or Manufacturer	Address
Auburn,	Auburn Automobile Company,	Auburn, Ind.
Buick,	Buick Motor Company,	Flint, Mich.
Cadillac,	Cadillac Motor Car Company,	Detroit, Mich.
Chevrolet,	Chevrolet Motor Company,	Detroit, Mich.
Chrysler,	Chrysler Sales Corporation,	Detroit, Mich.
Continental,	Continental Automobile Co.,	Detroit, Mich.
De Soto,	De Soto Motor Corporation,	Detroit, Mich.
Dodge Brothers,	Dodge Brothers Corporation,	Detroit, Mich.
Duesenberg,	Duesenberg, Inc.,	Indianapolis, Ind.
Franklin,	H. H. Franklin Manuf. Co.,	Syracuse, N. Y.
Graham,	Graham-Paige Motors Corp.,	Detroit, Mich.
Hudson,	Hudson Motor Car Company,	Detroit, Mich.
Hupmobile,	Hupp Motor Car Corporation,	Detroit, Mich.
Lafayette,	The Nash Motors Company,	Kenosha, Wis.
LaSalle,	Cadillac Motor Car Company,	Detroit, Mich.
Lincoln,	Lincoln Motor Company,	Detroit, Mich.
Nash,	The Nash Motors Company,	Kenosha, Wis.
Oldsmobile,	Olds Motor Works,	Lansing, Mich.
Packard,	Packard Motor Car Company,	Detroit, Mich.
Pierce-Arrow,	The Pierce-Arrow Motor Car Co.,	Buffalo, N. Y.
Plymouth,	Plymouth Motor Corporation,	Detroit, Mich.
Pontiac,	Pontiac Motor Company	Pontiac, Mich.
Reo,	Reo Motor Car Company,	Lansing, Mich.
Studebaker,	Studebaker Corporation,	South Bend, Ind.
Stutz,	Stutz Motor Car Co. of Amer. Inc.,	Indianapolis, Ind.
Terraplane,	Hudson Motor Car Company,	Detroit, Mich.
Willys-Overland,	The Willys-Overland Company,	Toledo, Ohio

[fol. 185] Motor Truck Manufacturers

Trade Name	Member or Manufacturer	Address
Autocar,	The Autocar Company,	Ardmore, Pa.
Corbitt,	The Corbitt Company,	Henderson, N. C.
Diamond T,	Diamond T Motor Car Company,	Chicago, Ill.
Federal,	Federal Motor Truck Company,	Detroit, Mich.
G. M. C.,	General Motors Truck Company,	Detroit, Mich.
Indiana,	The White Motor Company,	Cleveland, O.
International,	International Harvester Co.,	Chicago, Ill.
Kleiber,	Kleiber Motor Company,	San Francisco, Cal.
LaFrance-Republic,	Sterling Motor Truck Company,	Milwaukee, Wis.
Mack,	Mack Motor Truck Company,	New York, N. Y.
Moreland,	Moreland Motor Truck Co.,	Los Angeles, Cal.
Schacht,	The LeBlond-Schacht Truck Co.,	Cincinnati, O.
Sterling,	Sterling Motor Truck Company,	Milwaukee, Wis.
Stewart,	Stewart Motor Corporation,	Buffalo, N. Y.
Walter,	Walter Motor Truck Company,	Long Island City.
White,	The White Motor Company,	Cleveland, O.

[fol. 186] In United States District Court

[Title omitted]

Affidavit of Albert B. Unger

City of New York,
State of New York,
County of New York, ss:

Albert Blogg Unger, being duly sworn, deposes and says:

That he is the Acting District Attorney acting in stead and place of William Copeland Dodge, District Attorney of the County of New York for the State of New York.

That as such District Attorney it is his duty to prosecute in the name of the People of the State of New York, for the State of New York, through the media of formal judicial proceedings any and all violations of the laws of the State of New York.

That by virtue of his said office and the powers thereby conferred upon him, said District Attorney on the 3rd day of July, 1934, specially deputized Harold H. Straus, whose affidavit is annexed hereto and made a part hereof, as special assistant and counsel to deponent, to prosecute in the name of the People of the State of New York, and for the State of New York, any and all violations of the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade. That by virtue of the said deputization the said Harold H. Straus became vested with the right and duty to prosecute said violations.

[fol. 187] Deponent denies upon information and belief each and every allegation contained in each and every one of the moving affidavits. The sources of deponent's knowledge are the affidavits hereto annexed in opposition. The grounds of deponent's belief is the veracity and reliability of affiants therein and their intimate and thorough knowledge of the facts which they allege.

Deponent avers that the only prosecution brought against complainant herein was by the institution of a Magistrate's Court proceeding by the service of a summons upon complainant returnable on the 9th day of July, 1934, at the Commercial Frauds Magistrate's Court of the City of New York, located at 300 Mott Street, in the Borough of Manhattan, City of New York, in which complainant appeared, and the date of which was finallly set for the 17th day of August, 1934.

Deponent emphatically denies that he, the said District Attorney or the said Harold H. Straus, or anyone connected with, or employed by deponent's office, has made any open, public, or other statement or avowal of an intention to prosecute complainant herein for violation of the aforesaid Code, other than the pending proceeding.

Deponent affirmatively avers that the only prosecution commenced against complainant is the aforesaid proceeding now pending in the aforesaid Magistrate's Court.

Deponent avers that the District Attorney and the said Harold H. Straus, in the institution of said Magistrate's Court proceeding, and in the prosecution of complainant therein and thereby, have acted and are acting under and by virtue of the powers incident to the office of District Attorney, and the duties expressly conferred by such office, and are so acting only through the medium of a formal judicial proceeding.

[fol. 188] The District Attorney has not been specially designated under the terms of Chapter 781 of the Laws of 1933, to prosecute violations of said law, but has done so and is doing so only by virtue of the powers and duties of deponent as District Attorney, to prosecute all violations of law.

Deponent avers that the District Attorney has no intention of commencing or causing to be instituted any further prosecution against complainant, until complainant's rights, constitutional or otherwise, are adjudicated in the

present criminal proceeding pending against complainant.

Wherefore deponent respectfully requests that the application for a preliminary injunction herein be denied, and the bill in equity filed herein be dimissed.

Albert Blogg Unger.

Sworn to before me this 16th day of August, 1934.
Virginia McMorris, Notary Public, N. Y. County.

[fol. 189] In United States District Court

[Title omitted]

Affidavit of Frank N. McCoy, Jr., et al.

City of New York,
State of New York,
County of ——, ss:

——, being duly sworn deposes and says:

That he is —— of ——, which has its principal place of business at ——.

That said —— is a duly enfranchised dealer for the sale of —— automobiles, and that deponent has been in the automobile business for a period of — years and during that time has bought and sold hundreds of automobiles.

That he is familiar with the conditions prevailing in the industry prior to and since the approval and operation of the Code of Fair Competition for the Motor Vehicle Retailing Code.

That deponent has a substantial investment in the autobile business.

That despite the fact that enforcement of Code regulations has not yet reached a high degree of efficiency, conditions in the motor vehicle retailing trade have to deponent's knowledge improved since the approval and operation of the Code in that:

1. Cut throat competition is being eliminated.

2. Deponent's firm's business is in healthier condition.

[fol. 190] 3. Deponent's firm is employing more people than it did prior to the Code and its pay roll shows a substantial increase.

4. Working conditions such as hours of labor have improved.

5. Purchasers are now getting fair values for their used cars in trade, and greater values in the new cars they buy.

6. Dealers are prevented from selling new cars at below cost by not being permitted to allow to a customer more than the fair value of customer's used car traded in.

7. The inflation of list prices of new cars to provide for an over-Allowance on used cars taken in trade is being eliminated thus placing competition on the basis of intrinsic value rather than used car allowance, to the benefit of all concerned.

8. Deponent, because of the Official Used Car Guide Book, has suffered less losses than at any time prior to the approval of the said Code in the trade-in and sale of used cars.

The suspension of this Code, and especially of its cost protection features, in the form of an injunction by this Court, would immediately throw all dealers into vicious, cut-throat competition more brutal than ever before that could only result in the complete destruction of all the recovery gains that have been accomplished since the enactment of this Code.

As a practical business man, I appeal to the Court not to open the flood-gates of unbridled competition and engulf this industry again in chaos, insolvency and economic disintegration.

Wherefore deponent respectfully requests that plaintiff's application be denied.

——— ———.

Sworn to before me this — day of August, 1934.

——— ———.

[fol. 191] This form of affidavit was signed by:

	Name	Company	Place of Business	Franchised Dealer of	Years in Business
1.	Frank N. McCoy, Jr.	F. N. McCoy Co., Inc.	Peekskill, N. Y.	Buick	9
2.	Harry Gilbon	Gilbon Garage	Peekskill, N. Y.	Hupmobile	20
3.	R. M. Ayers	Ayers Motor Sales	Ossining, N. Y.	Chrysler and Plymouth	14
4.	W. H. Jackson	W. H. Jackson Auto Sales, Inc.	Ossining, N. Y.	Ford	9
5.	Frank L. Stevins	Paul Schund Co., Inc.	Peekskill, N. Y.	Chrysler and Plymouth	19
6.	R. Raubins	Tarrytown Universal Co., Inc.	Tarrytown, N. Y.	Ford	7
7.	S. C. Denike	Peekskill Garage & Service Station	Peekskill, N. Y.	Nash and LaFayette	18 Mos.
8.	Elizabeth J. Winkler	Cornelis Motor Inc.	Ossining, N. Y.	Dodge and Plymouth	14
9.	H. D. Geissler	Park Motor Sales Co.	Peekskill, N. Y.	DeSoto and Plymouth	2
10.	Leon Steinacker	Leons Garage	Peekskill, N. Y.	International Trucks	10
11.	Fred McCall	McCall & Rizzuto, Inc.	Ossining, N. Y.	Buick, Cadillac and La Salle	10
12.	Henry Heckman	Harmon Garage	Harmon, N. Y.	Chrysler and Plymouth	15
13.	V. O. Shankey	Shankey Motor Co.	Haverstraw, N. Y.	Ford	23

[fol. 192]

	Name	Company	Place of Business	Franchised Dealer of	Years in Business
14.	C. N. Allison	Allison's Garage	Haverstraw, N. Y.	Packard, Dodge and Plymouth	12
15.	Theodore Luce	Theodore Luce, Inc.	533 W. 57 St., N. Y. C.	Lincoln and Ford	8
16.	A. Egery	Nyack Buick Co., Inc.	Nyack, N. Y.	Buick and Pontiac	3
17.	James Breme	Careful Service Garage, Inc.	Haverstraw, N. Y.	Chevrolet	7
18.	Harold Driscoll	Driscoll Chevrolet, Inc.	Spring Valley	Chevrolet	10 Mos.
19.	Howard Kosel	Associated Motor Sales Corporation	Nyack, N. Y.	Dodge and Plymouth	26
20.	David E. Cordukes	Hamapo Auto Sales Co., Inc.	Suffern, N. Y.	Chevrolet	17
21.	H. F. Axt	Axt & Swanson	Spring Valley	Studebaker and Oldsmobile	9
22.	Harold P. Barker	La Fayette Motor Sales	Suffern, N. Y.	Ford	4
23.	C. R. Jones, Jr.	C. R. Jones Jr., Inc.	Nyack, N. Y.	Chevrolet	20
24.	Hogo Kolb	U-Go Service	Nyack, N. Y.	Chrysler and Plymouth	9
25.	John A. Golden	John A. Golden	Nanuet, N. Y.	Chrysler and Plymouth	20
26.	James M. Strickland	James M. Strickland	Spring Valley	Dodge and Plymouth	23
27.	Stewart W. Osborne	Monsey Garage	Monsey, N. Y.	Chrysler and Plymouth	13
28.	Albert A. Coneys	Albert A. Coneys	Nyack, N. Y.	Studebaker	12
29.	Alex Van Houten	Van Houten Garage	Suffern, N. Y.	Chrysler and Plymouth	8

[fol. 193]

Name	Company	Place of Business	Franchised Dealer of	Years in Business
30. George H. Kelly	Hensch & Kelly, Inc.	90-03 43rd Ave., Elmhurst, N. Y.	Ford	15
31. Max L. Habrich	F. N. Habrich, Inc.	139-14 Hillside Ave., Jamaica, L. I.	Oldsmobile	7
32. Wm. B. Jones	Wm. B. Jones, Springfield Garage, Inc.	Springfield Gardens, N. Y.	Dodge, Plymouth and Nash	22
33. Samuel A. Kaufer	Universal Car Sales and Service, Inc.	31-08 Northern Blvd., Long Island, N. Y.	Ford	17
34. Frederick C. Kengeter	Kenwood Motor Corp.	216-20 Jamaica Ave., Queens Village	Dodge and Plymouth	24
35. John E. Nachman	Nachman Motor Corp.	Queens Blvd. & Hillside Ave., Jamaica, N. Y.	Cadillac and LaSalle	13
36. Nathan Diamond	Diamond Motor Sales & Service, Inc.	Springfield Gardens, New York	Ford	1
37. A. W. Aylmero	Aylmero Garage	Peekskill, N. Y.	Dodge and Plymouth	10
38. Frank W. Kuhns	Wm. Wagner, Inc.	Bayside, N. Y.	Dodge and Plymouth	28
39. George J. Ryan	Ryan Sales & Service	207-02 Northern Blvd., Bayside, Queens.	Ford	12
40. Chris A. Winkler	Winkler & Schulter, Inc.	35-11 Prince St., Flushing, N. Y.	Ford	6
41. L. F. Jacod	L. F. Jacod & Co.	1739 Broadway, N. Y. C.	New and Used	20
42. Leo Picard	Picard Motors, Inc.	515 W. 49th St., N. Y. C.	Ford	19
43. W. E. Tarr	N. Y. Retail Branch Studebaker Sales Corp. of America.	615 W. 131 St., N. Y. C.	Studebaker	15

[fol. 194]

Name	Company	Place of Business	Franchised Dealer of	Years in Business
44. Alexander S. Low	Avon Motor Sales & Service, Inc.	3215 Broadway, N. Y. C.	Dodge and Plymouth	7 Mos.
45. W. H. Calswell	Caswell Motor Co.	651 W. 195 St., N. Y. C.	Ford	14
46. John N. Werring	Werring Chevrolet Co., Inc.	89-34 166 St. Jamaica, N. Y.	Chevrolet	4
47. E. Koeffel	E. Koeffel, Inc.	162-19 Hillside Ave., Jamaica, N. Y.	Chrysler and Plymouth	13
48. Bertha S. Goldberg	Payne Motor Co.	8625 Lefferts Ave., Richmond Hill.	Ford	12
49. H. F. Smith	Carth Motors, Inc.	Floral Park, L. I.	Ford	2
50. J. B. McAllister	Totten McAllister Motor Sales, Inc.	Little Neck, N. Y.	Ford	3
51. Arthur E. Wahlberg	Strong Buick	92-25 166 St. Jamaica, N. Y.	Buick and Pontiac	21
52. George C. Bond	George C. Bond	130-29 Merrick Rd., Springfield Gardens.	Chrysler	13
53. J. Wm. Klaess	Klaess Auto Corp.	1603 Far Rockaway Blvd., Far Rockaway	Buick and Pontiac	6
54. Thomas Drago	Mutual Motor Sales, Inc.	611 Manhattan Ave., Bklyn.	Pontiac	18
55. Steffen Bayers	Bayers Chevrolet, Inc.	34-14 Steinway St., L. I. City, N. Y.	Chevrolet	12
56. Jos. P. Carbonaro	Greenpoint Auto Sales, Inc.	25 Bushwick Ave., Brooklyn	Chrysler and Plymouth	6½
57. Philip Siegel	Kay Motor Sales, Inc.	1756 First Ave., N. Y. C.	DeSoto and Plymouth	3

[fol. 195] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF DAVID B. SPIELMAN

STATE OF NEW YORK,
County of New York, ss:

David B. Spielman, being duly sworn, deposes and says:

I am the President of the Spielman Motor Sales Co. Inc., the complainant herein, and am fully familiar with the facts herein.

That I did, on behalf of the plaintiff corporation, verify the bill of complaint herein, and that I did submit an affidavit in behalf of the complainant herein in support of its motion for a temporary injunction.

I have read the respective affidavits submitted by the defendant in opposition to the complainant's motion for an injunction pendente lite, and respectfully submit this affidavit in reply thereto.

As a preface to such reply, I desire to set forth to this Court, that the complainant is not alone in the position it [fol. 196] takes with respect to the marketing rules and provisions of the so-called "fair trade practices" of the Code of Fair Competition for the Motor Vehicle Retailing Trade.

On August 11th, 1934, there appeared in the Automotive Daily News, which is the trade newspaper of the Motor Vehicle Industry, an invitation to retail motor vehicle dealers, to express their opinions with respect to the operation of the "trade in provisions" of the Motor Vehicle Retailing Code.

The Automotive Daily News, in its issue of August 18th, 1934, and in its issue of August 25th, 1934, reprints two of the succinct demonstrations against the Code price fixing provisions, which I believe clearly sets forth the position of the dealer, situated like the complainant herein, with respect to the marketing rules of the Code of Fair Competition for the Motor Vehicle Retailing Trade.

Mr. R. H. Long of R. H. Long Motor Sales Co., of Farmingham, Mass., sums up his opposition to the Code in the following letter:

Finds Code a Conspiracy Which Hampers Dealers

By R. H. Long, R. H. Long Motor Sales Co., Farmingham, Mass.

"We are pleased to accept the invitation to state our views concerning the operation of the automobile code. We are much opposed to this code. When it was established dealers generally appeared to favor it, and we did not [fol. 197] choose to oppose the opinion of the majority.

"We mention the following reasons why the code is a calamity to the automobile dealers and manufacturers as well.

"First, it is an organized conspiracy against the good will of the automobile owners who are customers of the automobile dealers.

"It has reduced the volume of business beyond dispute. A comparison of the sales from July to December, 1933, before the code was established with the sales from January to June, 1934, shows a reduction in volume in business that dealers should have received of not less than 25 per cent. Business volume the first six months of any year should be at least 60 per cent greater than the volume of the six months of the preceding half year.

"Figures on this basis show the serious losses to automobile dealers.

"Fixing prices to be allowed for used cars is a very foolish scheme. An organized conspiracy that suggests employing spies and stool-pigeons is not a respectable adventure for any business. The whole scheme of the automobile code puts automobile dealers into straight-jackets and attempts to practice long distance management that can never be successful.

"The plan to fix the same price limit for all dealers to allow on used cars is unfair to the dealers and manufacturers of high priced cars. The automobile owner resents being denied the opportunity to bargain in a trade for his automobile."

In the issue of August 18th, 1934, the Automotive Daily News, reprints a criticism by Mr. M. H. Bury, of Bury & Holman, Inc., of Philadelphia, in which he states in part:

[fol. 198] By M. H. Bury, Bury & Holman, Inc., Philadelphia

"We welcome the attitude you have taken in the Aug. 11 issue of Automotive Daily News wherein you ask dealers what they think of the code and present code enforcement. Frankly, we think the code as it applies to hours and wages is excellent. True, we have suffered some har-ships in the matter of hours but have employed additional help to overcome this problem. Our wages, however, were equal to code requirements before the code was originally introduced.

"As to price fixing and the establishment of maximum used car allowances, we as a representative dealer with high merchandising standards have suffered. Our sales at retail are beneath those of last year, as are our retail gross profits. In addition to this, increased wages by virtue of other code requirements and increased general expenses such as the cost of code books, the amount of money we pay several times monthly for code enforcement, all coupled together have reduced net profits considerably.

"In our locality an able code administrator has struggled to overcome insurmountable difficulties; he has tried to be fair but has met with all kinds of opposition, both legal and otherwise. We are a corporation. Our books are audited once a month. The auditing is done in accordance with the standard practice of the Chrysler Corp., which brooks no irregularities such as might be used to cover up a code violation. Were there to be a code violation within this organization, our records would reveal it to any C. P. A. immediately.

"Other smaller dealers are not so fortunate, or unfortunate, as the case may be. They do business out of two trouser pockets, and their net financial statement at the end of any given month is computed on the basis of the increased cash on hand as of the end of one month over the end of the previous month. It is extremely difficult to prove the guilt of these dealers, yet we can point to several of them in the Philadelphia area whose volume in units has increased two and three times over their volume prior to code introduction. To compete with them is impossible under existing conditions.

"Of course, the solution would be to have the factories join forces with the code administrators and agree to cancel out dealers whose methods of doing business are irregular. This, as we say, would be a solution in that it would

elevate the business of merchandising automobiles to the dignified level of the merchandising of other commodities. [fol. 199] Its principal drawback, however, is that it would unquestionably cut down demand and therefore production, which in turn would reduce employment.

"We make this statement because we have talked to a large portion of the automobile buying public in Philadelphia who, if their car is in generally good condition, refused to let the government or anybody else tell them what it is worth or how much can be allowed for it.

. . . . . .

"A prospective purchaser with a car in exceedingly poor condition keeps shopping, as he did before the code went into effect, until someone allows him the limit.

"The prospective purchaser with a car in good condition either will not trade it at the limit of allowance or will shop around until he finds someone willing to violate the code, and there are plenty of these latter dealers.

"We keep a daily record of the number of people who enter our showroom, which is in a prominent metropolitan automobile location. We find that our floor contacts are less than 50 per cent of the number of contacts during the same period a year ago, and we attribute this strictly to the fact that we let it be known early this year that we would not violate the code or consider any subterfuge which might be considered a violation.

"Resultantly, our volume of profitable business is alarmingly low and the large percentage of our total business is the type earlier enumerated wherein the used car is in such terrible condition as not to be anywhere near code book figures. Our efforts to secure this business at a lower figure have for the most part resulted in complete failure.

"Summing up, therefore, our general reaction to the code is decidedly unfavorable. Furthermore, we do not believe that it will ever succeed without factory assistance, but also we are not advocating such assistance. We contend that the government should stick to the business of governing and leave commercial business to the millions of men througout the country who have been successfully attending to their business for many generations."

[fol. 200] When the newspaper reports of this litigation appeared in the daily press, the complainant herein was

favored by the receipt of a response from David H. Jones, Inc., 15 Valley Stream, South Orange, New Jersey, a Pontiac automobile dealer. The letter forcefully expounds the position of the complainant herein and I take the liberty therefor, because of its peculiar relevance to the issues in this case, to annex a copy of the said letter as exhibit "A".

I believe that the foregoing letters are sufficiently clear in themselves, to sustain the position of the complainant herein. Were it at all feasible to have every honest dealer express his honest opinion, in writing, an avalanche of discord and discontent would result. However, the fear that predominates amongst dealers, deters them generally from putting into writing their honest convictions. From personal conversations that I have had with hundreds of dealers, I assure this Court that the overwhelming majority of those I have spoken to, condemn the trade-in provisions of this Code.

I have carefully read the opposing affidavits submitted on this application, have studied and discussed them with my counsel and with statisticians and members of the industry, and I respectfully submit to this Court, that after an analysis of the said affidavits which I hereinafter set forth, the material allegations of the complainant's bill of complaint [fol. 201] herein and the assertions made by it in the affidavit submitted by me in supporf of this motion, are established either by admission or by the preponderating weight of the credible facts in this controversy.

There can be very little doubt that the most outstanding fact in this case is the unfairness of the "average" price allowance, both to consumer and more particularly, to the dealer; that the fixation of maximum "average" prices for trade-ins, has no relation to any just object of government; that by the attempt to enforce such provisions against the complainant, the complainant will be denied its constitutional rights, be hampered and restricted in the course of its business, to its great financial loss; that it has lost in the year 1934, as a direct result of this code provision, over One Hundred Thousand Dollars in sales, and that the continuance of this provision will further entail undue financial loss.

That if the defendant herein is not restrained from the threatened enforcement by threatened criminal prosecution of that provision, the complainant herein will be de-

prived of its property without due process of law, for the penalties for the violation of Chapter 781 of the Laws of 1933 are so drastic ($500.00 fine per day for each alleged violation) that the complainant may not accept automobiles on trade-ins at greater than the maximum "average" prices determined, even for the purpose of testing the validity of this very law. If the complainant violates the law, it is subject to the severe penalties prescribed therein. [fol. 202] On the other hand, if it adheres to the alleged law, it is thereby being deprived of its property, without due process of law, by reason of the unjust, illegal and inequitable restrictions imposed upon it, which have been and are destroying its business and its right to continue therein lawfully, without interference.

This type of action is the only form available to the complainant to test the validity of this law.

To further substantiate the assertions of the complainant herein, I refer this Court, respectfully, to an analysis of the answering affidavits submitted by the defendant. It will be seen from such analysis of the affidavits, that the defendant clearly manifests an attempt to distort the true facts and to minimize the basic grievance asserted by the complainant. This, to no avail, however, for the basic facts are undeniable.

Affidavit of John B. Hulett

John B. Hulett establishes that he is the Commissioner of the Metropolitan New York State Advisory Committee of the Motor Vehicle Retailing Trade, and as such it is his duty to secure compliance to the Code of Fair Competition for this industry in an area contemplating many counties of the State of New York and the State of New Jersey. [fol. 203] Mr. Hulett calls the Court's attention to the fact that the complainant admits violating the price regulation provisions of the said code. And in order to substantiate such point, makes specific reference to the Twenty-first Paragraph of the complainant's complaint. This is a bold attempt to distort the true facts. His quotation of the language of the complaint has been removed from its context.

In Paragraph Twenty of the complaint, the complainant states:

"That the complainant herein, in accordance with the policies of the Act of Congress expressed in the National Industrial Recovery Act has duly cooperated in the rehabilitation of industry and has duly complied with all provisions of the Code of Fair Competition * * *."

In Paragraph Twenty-One, it is stated that if the complainant would be permitted to offer actu-l, fair and honest values for used car trade-ins:

"that it would make a fair return and profit on its investment."

The tense of the verbs used and the general context of the entire complaint clearly display the intention of the drafter of the complaint to indicate that past experience would demonstrate that trading on a basis of "true values" of trade-ins would afford the Spielman Motor Sales Co., Inc., an opportunity to make fair profits.

[fol. 204] The affidavit submitted upon this application, in clear and uncertain language, sets forth the statement by the President of the complainant, David B. Spielman, that no violation of the code on the part of the complainant has ever transpired. To seize upon any possible ambiguosity to spell out an admission when all the papers in the argument before this Court have demonstrated otherwise cannot be characterized as fair.

Mr. Hulett further states:

"That at this point no monetary loss has apparently been suffered by this complainant."

In my affidavit, I clearly set forth that approximately 180 sales made by other dealers and lost by the Spielman Motor Sales Co., Inc., could be directly traced and that over $100,000.00 in sales had, as a result, been lost. It is hard to conceive how this statement does not clearly spell out a substantial monetary loss.

Mr. Hulett further states:

"That his complaint [referring to the complainant's complaint] is barren of any facts tending to show his version of the facts of the pending proceedings in the Com-

mercial Frauds Court Division of the City Magistrates Court."

I do not believe that Mr. Hulett can deny that there is present an intention and the actual threat of prosecution on the part of the defendant, William C. Dodge, District At- [fol. 205] torney for the State of New York at the instance of Mr. Hulett against the complainant for a violation of those provisions of the said Code of Fair Competition relating to price regulation. Whether or not the threat of prosecution relates to discounts or trade-ins is immaterial because the net result of both provisions is to establish a fixed price for the sale of a new car to prospective purchasers. The attempt on the part of Mr. Hulett to disqualify the present action on such thin pretense of technicality can only be interpreted in the light that there is certainly no desire to test this vital and important question on the part of this Administrator.

Irrespective, however, of the distinction between these provisions relating to price regulation, there is now pending threats of prosecution by the very Administrator, John B. Hulett, for trades involving trade-ins.

Mr. Hulett further states:

"That deponent avers, upon information and belief, that the said complainant has, since January 1, 1934, opened two new branches of his business which may account for the said Spielman Motor Sales Co. Inc.'s assertion that its payroll has increased more than 50%."

This is an obvious attempt on the part of this affiant to belittle the complainant and to display to this Court that representations made to it by the counsel for the complainant were in fact not true. While it is true that the complainant has opened two new branches of its business, this [fol. 206] does not vary the true facts. The facts are simple. Prior to the adoption of this Code of Fair Competition, the complainant employed, in its Brooklyn branches, which have been established for eleven years, 43 employes. At the present time, these branches employ 65 employes, an increase of approximately 50%. This figure is absolutely independent of the new branches opened in the Borough of Manhattan. It is proper at this point, to clearly set forth the policy of the complainant with respect to its

employes from the day of its very inception in 1923. The complainant has always made it a policy to pay its employes, from the lowly boy that helps the mechanic to the executive head of each branch, far better compensation than the average dealer in this particular area. This policy has been conscientiously pursued up to the present time; in fact, at the time of the adoption of the Code, wages paid to Spielman Motor Sales Co. Inc. employes were so high that the minimum requirements of the Code of Fair Competition did not alter the salary of any employe. This was so because they were then receiving wages far in excess of the minimum provided by the Code of Fair Competition. The only adjustment affected by the Code was in the revision of hours of employment. This accounts for the increase in the number of employes.

Mr. Houlett then states:

"That deponent knows of no affirmative step on the part of said complainant that he has enthusiastically cooperated to reemploy more people at a fair wage. As a matter of fact, a labor complaint was lodged against the Spielman Motor Sales Co. Inc. in the early part of February, 1934 with our Code Authority. On refusal of the said Spielman [fol. 207] Motor Sales Co. Inc. to sign a statement of the facts in the case, the file was held in abeyance."

We can think of no more definite illustration of "enthusiastically cooperating" than an actual increase in the number of employes to the extent of 50%.

This is more evident when the volume of sales in the Brooklyn Branches which increased their employe number to the percentage described, actually secured no increase in sales, so that the complainant voluntarily assumed an enormous additional burden to carry out its responsibility to the National Recovery program.

With reference to the labor complaint lodged against the complainant, much can be said. The question at issue in the complaint referred to was whether or not an "apprentice" could be employed in establishments engaging more than nineteen employes. The express provision of Article 3, Section (b), Sub-section 4 of the said Code of Fair Competition specifically states:

"and except that in establishments employing more than 19 employes, the number of such employes who are paid

less than $13.00 per week may equal but not exceed 10% of the total number of employes in any such establishment * * *."

At the time of the controversy, the complainant was entitled to employ eight such "apprentices" because it employed more than 80 people, but, in fact, only three people were so engaged. Mr. J. B. Hulett, as will be more fully described in this affidavit, sought every means and oppor-
[fol. 208] tunity to embarrass the complainant. Despite this express provision of the Code, he emphatically denied the right to the complainant to employ any one in the capacity of an apprentice. This case was taken up by the New York State Authorities of the N. R. A. but upon investigating the facts, they refused to act upon them because of the obvious provision of the Code.

At one of the hearings before Mr. Hulett, the President of the complainant, David B. Spielman, was urged to sign a legal document setting forth a set of facts inconsistent with the true facts which were to have admitted a violation of the Code. Though Mr. Spielman was not represented by legal counsel, he was urged to so sign if he desired to avoid "trouble". Despite this attempt at intimidation by Mr. Hulett, Mr. Spielman refused to sign and upon a display of the paper given to him for signature to his counsel, he was advised that no authority existed in Mr. Hulett to demand such a statement and that in fact such conduct on the part of Mr. Hulett was grossly unethical and unfair. The statement on the part of Mr. Hulett merely citing the labor complaint without advising the Court of its true disposition or the nature of the paper he desired the complainant to sign is a withholding of the facts from this Court tantamount to misleading the Court.

Mr. Hulett then makes reference to an affidavit of one Jack Frost and an affidavit of one Ralph Ebbert. These affidavits will be discussed when the said respective affidavits are analyzed herein. Mr. Hulett then states:

[fol. 209] "Your deponent calls the Court's attention to the fact that at least upon one occasion, soon after, the advent of the Code of Fair Competition for the Motor Vehicle Retailing Trade, he had a conversation with the said Spielman and tried to convince him of the great possibilities of the Code from the standpoint of the dealer and

was informed by said Spielman that while he was sympathetic and felt that the Code properly enforced would be a great benefit to all dealers, he would not sign compliance with the Code until he had further opportunity to discuss the matter with his factory officials and ascertain their attitude toward the Code with special reference to his connection with it in any way."

This statement is not true. I have, as the representative of the complainant, prior to the inception of the Code and at every trade meeting that I attended thereafter, emphatically denounced those provisions of the Code of Fair Competition relating to price regulation. My attitude has been consistent, i. e., simply that such Code provisions could never effectually operate and that in the course of time it would cause the entire collapse of the Code structure. Though the complainant has complied with these price regulations to the present time, I have never, as its representative, ever committed any act that would demonstrate the assent on the part of the complainant to such arbitrary and unworkable provisions.

As a matter of fact upon the printing and distribution of the first guidebook establishing maximum used car price allowances, I had considerable difficulty in securing such from Mr. Hulett because I refused to sign a membership [fol. 210] blank in the National Automobile Dealers Association, and a certificate of compliance which provided for a confirmation on the part of the complainant to all of the provisions of the said Code of Fair Competition. This position taken by the complainant was not taken in order to disrupt the administration of the Code but to consistently object to those "fair trade practice provisions" relating to price regulation. One instance is outstanding in my mind. One of our executives, at my instructions, appeared at the office of Mr. Hulett and requested the guidebook and offered to pay for the same. Mr. Hulett refused the tender and demanded the signing of an application to join the National Automobile Dealers Association. This executive refused and upon his return I then made my way to the office of Mr. Hulett. It was only after I had told Mr. Hulett that I would not be responsible for Code violations by the complainant due to lack of knowledge of the prices contained in the guidebook because of his refusal

to avail the complainant of its use, did he listen to reason. Only after I had signed the following statement:

"You are hereby authorized to distribute the money for our subscriptions as you desire with the distinct understanding that in no way whatsoever are we to be considered as a member of the Motor Vehicle Retailing Code Administration of Metropolitan New York. This letter is sent for the sole purpose of subscribing to the official guidebook Used Car only.

(Signed) David B. Spielman."

did Mr. Hulett permit the complainant to have a copy of the guidebook. It is indeed difficult to possibly understand [fol. 211] that after the extreme inconvenience that the complainant has been put to in support of its position that Mr. Hulett could possibly state that I, representing the complainant, was sympathetic with the price regulatory provisions of the Code of Fair Competition. Despite our avowed position, as above indicated, the complainant has always complied with every provision of this Code and it is now complying with the Code.

Mr. Hulett further states:

"At this point, your deponent desires to advise this Court that at no time, to his knowledge, has the said complainant nor the said David B. Spielman assented to the code. His statements in his affidavit to the effect that he has rigidly adhered to the provisions of the Code seem inconsistent with the fact that he failed to sign compliance with the Code."

The signing of a statement of compliance to the Code has never been a requirement of adherence to the provisions of any Code.

Mr. Hulett states that the complainant had ample opportunity to express his position at all trade hearings in respect to the Code. I submit that I attended practically all of these trade hearings in this area and when afforded an opportunity to speak, expressed the attitude of the complainant as above described.

Mr. Hulett seems to make much of the fact that one of the affidavits submitted on behalf of the complainant was executed by Edna Sperl Burke, of the Bushwick Decatur

Motors, Inc., who has been charged with two violations in [fol. 212] the Magistrates Court. I cannot see the relevancy of this fact to the issue at bar other than the fact that this Company has been victimized in the same manner as the complainant.

Mr. Hulett further states:

"Deponent has received no word from the said complainant, as Code Authority, of the 170 or 180 sales of automobiles which were lost by complainant and by him allegedly lost because the sales were subsequently consummated by other dealers at prices prohibited by Code regulations. It should be the duty of the complainant if he knows of such violations of the Code to report same to the Code Authority."

On the — day of ——, 1933, and on several occasions thereafter, the complainant mailed to the Motor Vehicle Retailing Code Administration, attention of Mr. J. B. Hulett, complaints of violations of the price provisions of this Code. Each one of these complaints represented lost sales. The details of each complaint were set forth and the names of the purchaser of the car and the address of the purchaser detailed. Specifically, the names and addresses of each such purchaser are as follows:

[fol. 213]

Name	Address	Purchased car from
Mr. Schors	c/o Gold Seal Button, Works, 416 Marcy Ave., Bklyn	Bates Chevrolet
H. Sternberg	4403 Avenue I, Bklyn	Prince Motors
Metro Woolen Co.	7 Washington Pl., N. Y. C.	
H. Q. Seidner	401 Bway., N. Y. C.	Brownsville Chev. Co.
Mr. Weinstein	c/o Dominion Dyeing Co., Inc., 81 Crosby St., N. Y. C.	Bates Chev.
Mr. Ladzin	308 Bedford Ave., Bklyn	
I. Abramovitz	96 Stanton St., N. Y. C.	
Hampar & Co. Inc.	69 Greene St., N. Y. C.	
G. Rubner	2101 Westbury Court, Bklyn	
Sidney Topal	1635 Atlantic Ave., Bklyn	Brownsville Chev. Co.

[fol. 214] In spite of the number of such violations and in spite of a conference had by myself with Mr. Hulett's assistant, Jacob Cross, no action of any kind was ever taken by the Administrator. Considerable time and effort was expended to secure the details of these complaints and when the complainant found that absolutely no action could be obtained from the Administrator, reporting of obvious complaints was completely abandoned. It is most difficult

to perceive how Mr. Hulett can state that he was not cognizant of such violations and the loss of sales on the part of the complainant.

Mr. Hulett further states:

"Your deponent denies the allegation of the said Spielman that his records indicated over 1200 complaints of violations in the Metropolitan Area of New York, but deponent did talk with said Spielman and estimated that number of complainants."

"Your deponent has, however, since checked the complaints made and finds that since October 3rd, 1933, there have been 964 complaints. A large percentage of these were unfounded, no violations having occurred. The dealers involved in proven cases are about 125, or about 8% of the total number of dealers in that our list of dealers, according to the records of the Secretary of State of New York, shows that there are 1559 dealers in the ten Counties under the jurisdiction of the Metropolitan New York State Advisory Committee, of which your deponent is the Commissioner."

[fol. 215] An admitted report of approximately 1,000 violations with 1,559 dealers certainly manifests widespread disregard for the price regulatory provisions of the Code of Fair Competition.

It is also reasonable to assume that reported violations of other dealers were handled in the same manner as that submitted by the complainant. It is further reasonable to assume that most dealers securing no action upon their reported complaints lost heart and abandoned the method of reporting complaints. If the experience of the complainant is typical of the other dealers in the Metropolitan Area of New York, it is reasonable to assume that more than 10,000 violations have actually occurred. This, if distributed between the dealers of this area, would represent 7 violations to each dealer. Further, we must take into consideration that most violations are never detected and consequently never reported. In light of such facts, it is reasonable to assume that compliance is rare and violations rife.

Mr. Hulett further states:

"Your deponent denies that he and/or his office has at any time used 'persuasion, then threats, then boycotts, then

intimidation,' as alleged by the said Spielman. As a matter of fact, the evidence in support of the pending proceeding under which the said Spielman is now in the Magistrates Court, was secured through the Association of which he is a member, as more specifically set forth in the affidavit of Ralph Ebbert, aforementioned."

It would be wise, at this time, to expose what might be [fol. 216] characterized by the "yellow press" as a "racket".

The Motor Vehicle Retailing Code Administration for the Metropolitan Area of New York, Mr. J. B. Hulett, Commissioner, has been administering the Retail Motor Vehicle Industry with an avowed demonstration of executive, judicial and legislative powers much akin to that of a sovereign power. Every means that could be devised by human ingenuity was used to cudgel members into this Association. As I have heretofore set forth, the simple attempt to get a copy of the guidebook was refused until considerable ado had been made because the applicant had refused to join the Association. The obvious object of this was to build up a bureaucratic device that would perpetuate the officers of the Association in their respective positions, availing them of substantial income for their efforts. The facts bear out these bold assertions. Mr. Hulett in his affidavit sets forth that there have been 125 proven violations of the Code of Fair Competition. I do not believe that more than ten of these have ever found their way into the Court. All of the others have been adjudicated by the Commissioner or his subordinates. Invariably the adjudication was a finding of "Guilty" and an imposition of a substantial fine. I have been informed that fines ranging from $50 to $500 have been imposed and collected. Of course these sums running to vast proportions have found their way into the coffers of the Association subject to the use of its officers.

An incident to which I was a party will clearly bear this [fol. 217] out. The very proceedings now in the Magistrates Court against the complainant was only instituted after a series of conferences with Mr. Hulett. On June 9th at 5:00 P. M., Mr. Hulett sent a letter addressed to me personally, requesting me to be in attendance at his office in New York at 11:00 A. M. Monday, June 11th. I re-

ceived this letter about 11:00 A. M., Monday, June 11th, and promptly communicated with Mr. Hulett. His secretary advised me that he was in conference and could not be disturbed but told me it was of vital importance to forthwith appear at the office because the complainant, Spielman Motor Sales Co. Inc. was in very "serious trouble". Though impressed with the attempt on the part of the secretary to fill me with awe and fear of an impending calamity, I finally begged off and secured leave to appear the following Thursday. On Thursday I was ushered into the presence of Mr. Hulett. Mr. Hulett advised me that a very serious violation had been secured against the Spielman Motor Sales Co. and that unless I would sign an agreement to be bound by the findings of a commission operating under this Motor Vehicle Retailing Code Administration, the matter would be subject to the Magistrates Court and a criminal prosecution commenced. I refused to sign and told him that I knew of no violations and that I was not going to be cudgeled into any agreement before any commission whose verdict always seemed to be "Guilty" with a substantial fine attached thereto.

Mr. Hulett then told me that he had an investigator with a dictaphone record of a violation by one of our salesmen. [fol. 218] He advised me that considerable effort had been made and that he had the absolute proof in the form of this dictaphone record. Mr. Hulett volunteered that I take a few days to investigate the matter but felt that it would be wise to keep the matter out of the courts. I did return to his office the following Saturday afternoon and told him that I had learned how he had endeavored to entrap one of my employes, and, in the vernacular, had veritably "framed" one of the salesmen. I then emphatically told Mr. Hulett, in rather strong language, that I would have no part of his Association or any Association that used such dastardly methods and practices.

I have cited this incident in detail to clearly demonstrate to this Court that this Association and its Commissioner has been using the Code and the N. I. R. A. as a vehicle for the advancement of their own pecuniary benefit. That they have performed the functions of both judge and jury alike. That they had used every means of deceit, device and trickery to establish a violation of the Code and then having established such "violation" brought the violator be-

fore their own composed Committee which fined the violator, the proceeds of which fine eventuated into the coffers of the Association.

Those high-handed practices of meting out punishment came to the attention and ears of Senator Nathan Straus, Administrator of the State of New York of the N. R. A. Mr. Hulett was severely censored and advised to abandon such methods.

[fol. 219] When Mr. Hulett states in his affidavit to this Court that he was not the moving factor in securing the threatened action on the part of the District Attorney in the proceedings in the Magistrates Court but that the same was done through a local Brooklyn Association of which the complainant is a member, I feel that such is nothing but a deliberate attempt to mislead this Court. Such action in the Magistrates Court followed promptly after I had been threatened with criminal proceedings by Mr. Hulett and is his own office and after I had strongly advised him that I would not submit to the judgment of a commission formed from his own Association.

These practices are known to virtually every member of the trade and have so instilled fear and dread of the wrath of the Commissioner and his Association that no intelligent or honest statement of true facts can be obtained from most of the members of the industry. I have spoken to more than 100 retail dealers in the Metropolitan Area of New York, and with one single exception, everyone has frankly expressed their thoughts that the price regulatory provisions of this Code of Fair Competition was absolutely unworkable and was creating serious prejudices to most of the members of the trade. They further expressed that if the Code were strictly enforced, its inequalities would so stagnate the retail automobile business as to cause sheer hardship and possible financial difficulties on the part of [fol. 220] most dealers. They frankly admitted that practically all dealers were violating the Code and that the only manner that they could continue to remain in business would be to violate. When I asked these dealers to place their expressions in the form of affidavits so as to submit it to this Court, with the exception of 10 dealers, all of the others frankly manifested fear of what might happen if the wrath of the Commissioner, Mr. Hulett, were incurred against them.

Similarly, I have been advised that the Commissioner has sent his emissaries to secure affidavits refuting the affidavits submitted on behalf of the complainant in this action; that though there are more than 750 dealers in this Metropolitan Area only 57 dealers were willing to execute affidavits. These affidavits for the most part contained rank falsehoods regarding the operation of the Code of Fair Competition in the Metropolitan Area. They have been executed in the fear that if they would refuse the Commissioner, they would be singled out in the same manner as the complainant has been.

Mr. Hulett further states in his affidavit:

"Your deponent denies that every sale of a new automobile by the complainant was pursued by your deponent of his office."

[fol. 221] "Deponent further denies that threats and intimidation were used against customers of the said Spielman who refused to answer questionnaires regarding their purchases.

"Your deponent as Code Commissioner has caused questionnaires to be sent in the regular course of checking on some sales of all dealers for the protection of the public, and it may be that some of these have been received by some of said Spielman's purchasers. These questionnaires are invariably sent by mail, so that the question of intimidation could not take place. In a small percentage of cases investigators are sent out to call on these purchasers, but they are all instructed by your deponent personally to ask for the information desired in a gentlemanly and courteous way, and if the information is refused to further advise his office."

It may be true that "every sale" was not pursued but it is quite certain that most sales were pursued by Mr. Hulett. There can be no doubt that Mr. Hulett singled out the complainant because of its aggressive expression of opinion about the effectiveness of the Code. In fact I have been informed by a special investigator that Mr. Hulett sought to employ him for the express and sole purpose of tracing down every one of the Spielman Motor Sales Co. contracts. This special investigator refused the employment because he felt such services would prejudice his pre-

vious business relations with the retail automobile dealers in this area. Annexed hereto is the affidavit of one Gabriel Cohen which sets forth in detail how he was abused and threatened with criminal prosecution because he refused to sign a statement concerning the details of one of his trades with the complainant. This certainly does manifest the type of tactics employed particularly directed toward the complainant.

[fol. 222] The most ludicrous statement in the entire affidavit is his statement that such investigation has been "for the protection of the public". No statement ever could have been further from the truth.

This benefactor of the public at large seems to be a sheep in wolf's clothing. In January of 1934, a special ruling was made by the Administrator compelling the fixation of an additional charge to every prospective purchaser of an automobile in the purchase of a low priced car in the sum of $28.50. This charge was for "handling charges". Practically every Chevrolet dealer in the Metropolitan Area of the City of New York petitioned Mr. Hulett to eliminate this charge because they felt it was an unfair burden upon the public. This petition fell upon deaf ears. I do not believe that one single act on behalf of the Administrator can be cited where the public secured any benefit therefrom. Nor is it obvious to me how the investigation on the part of the Administrator could possibly benefit the purchasing public.

In conclusion, I feel that if Mr. Hulett's affidavit is read, together with the facts I have endeavored to display relating to his decisions, there can be but one determination and that is that the Code of Fair Competition for the Motor Vehicle Retailing Trade can never operate with respect to its price regulation provisions because they are arbitrary, illfounded and unenforceable.

[fol. 223] Affidavit of Ralph Ebbert

The affidavit of Ralph Ebbert is entirely devoted to an elaboration of the fact that neither the complainant nor any of its officers have at any time ever expressed any dissatisfaction with the Code of Fair Competition for the Motor Vehicle Retailing Trade.

I know Mr. Ebbert intimately and I have an extremely high regard of the man's character and reputation. He is

holding the position of Manager of the Brooklyn Motor Vehicle Dealers Association and has been for fourteen years. His position would be severely jeopardized if he would express his personal sentiments contrary to the dictates of Mr. J. B. Hulett, Commissioner for the Motor Vehicle Retailing Trade for the Metropolitan Area of New York.

In light of the unfortunate position that Mr. Ebbert is placed in, it is not difficult to understand the expressions of fact contained in his affidavit.

Mr. Ebbert's memory seems to be rather short-lived.

He mentions two trade association meetings, one at the Hotel St. George and the other at the Garden City Hotel; both of which he remarks were never attended by any representative of the complainant corporation.

I attended the meeting at the Hotel St. George in Brooklyn on August 10, 1933. This was the largest gathering of Brooklyn automobile dealers I have ever attended. The [fol. 224] N. R. A. program had just reached the zenith of its emotional peak. The dissenter to any part or form of the program was met with the jeers and derisions of a traitor. The meeting was marked principally by the fiery enthusiasm and flag waving that was typical of that era. Enthusiastic resolutions without even calling for a vote of "Nay" were passed. I did not vote at that hearing nor was I afforded an opportunity to speak although frankly I did not endeavor to secure the floor. During the course of the meeting, pledges of compliance and endorsement of the Code of Fair Competition for the Motor Vehicle Retailing Trade were distributed throughout the meeting for signature. I refused to sign this compliance certificate and emphatically told everyone in attendance around me that I would not permit this unbridled, emotional outburst to have my endorsement, as a part of the National Recovery Program, price regulations in this Code of Fair Competition that would eventually be destined to failure. Mr. Ebbert knows these facts to be true.

I attended a meeting on behalf of the complainant corporation in the Hotel New Yorker on December 13, 1933. Mr. Ebbert attended this meeting as well as Mr. Harry G. Bragg, General Manager of the Automobile Merchants Association of New York, Inc., the local Manhattan association. At this meeting I was called upon to speak and I

very emphatically denounced the price regulation provisions of this Code of Fair Competition and introduced at this meeting a resolution. This resolution, in its recitation, stated:

[fol. 225] "Whereas, a meeting of all Chevrolet dealers operating under the Code of Fair Competition for the Motor Vehicle Retailing Trade in District #2 held at the New Yorker Hotel, a meeting on December 13, 1933; and

"Whereas, these dealers have surveyed the prices on Chevrolet used cars as quoted in the N. A. D. A. Code Book; and

"Whereas, they feel that these prices as arrived at have the tendency of reducing their sales and thus defeat the purposes of N. R. A. to increase wages and shorten hours; and

"Whereas, these prices put in the hands of competition sales arguments of depreciation that will hinder Chevrolet dealers new car sales; and

"Whereas, practically all the dealers at this meeting had returned to them actual reported sales of used cars that the N. A. D. A. refused to accept because they claimed these figures were inflated and thus refused to consider them in their compiling of a fair price for used Chevrolets and

"Whereas, the present used car Chevrolet prices will tend to slow up the tremendous replacement business which all dealers and car manufacturers are now trying to tap;

"Therefore, Be it Resolved that the President of this meeting is hereby empowered to appoint a committee of 5 whose duties it shall be to have presented to those powers that be that they take such steps to correct and rectify these present Chevrolet used car prices and publish such figures as will place Chevrolet in a fair comparative light with competitive cars of its price class."

This resolution modified was subsequently adopted by those in attendance at the meeting and I was appointed as one of the Committee of Five. Mr. Ebbert was in attendance at this meeting and it is hard to conceive that he should represent that no condemnation of the Code and its Fair Trade Practice provisions was ever made by a repre-

sentative of the complainant corporation. I have likewise [fol. 226] attended many other trade meetings principally of Chevrolet dealers and I have never missed the opportunity at such trade hearings to voice the position of the Spielman Motor Sales Co. Inc.

In the last few months, I have had occasion to speak to Mr. Ebbert in connection with the problems of the trade on four separate and distinct occasions. On each of these occasions I reiterated my position to Mr. Ebbert and discussed with him various phases of the problem. As a matter of fact, only so short a period as ten days ago, I communicated with Mr. Ebbert and asked him whether in light of this present application I would be welcome to attend a trade gathering in the Garden City Hotel in Garden City. He very jovially extended a hearty invitation as the result of which I attended this trade meeting. After the meeting had concluded, I again spoke to Mr. Ebbert and he at that time heartily expressed himself to the effect that he did not want this present litigation to disrupt his friendship with me and that there was considerable merit to much of my position.

Mr. Ebbert also states:

"That the Brooklyn and Long Island Automobile Dealers Association has no record of any letters sent in protest of the Code of Fair Competition for the Motor Vehicle Retailing Trade from the said complaint."

The Brooklyn and Long Island Automobile Dealers Association has no official standing of any kind whatsoever in the enforcement of the Code provisions and consequently would certainly not be the proper authority to address any letters of objection.

[fol. 227] In light of all these facts it is hard to reconcile the apparent impression of the affidavit that no objection at any time had been voiced by the complainant or its officers.

Affidavit of Hiram Bates Pope —

At the very outset, to truly evaluate this affidavit it is only fair to know the background of the affiant.

The years 1919 to 1923 I was engaged in the automobile supply business and from the year 1923 to the present time

I have been engaged in the sale of automobiles, all in the Metropolitan Area of the City of New York. During this period, I have joined many trade associations and fairly consistently attended all trade hearings. I have frequently visited the establishments of my competitors and have had frequent occasion to discuss business problems with them.

During this period of fifteen years, I have never heard of the magazine "Automobile Topics" with which the affiant, Hiram Bates Pope, is identified. I have never seen a single copy either in my establishment or the establishment of any other automobile dealer that I have visited.

I have never been solicited for a subscription either personally or by mail.

[fol. 228] I have never heard discussed by any person engaged in the trade any article or printed information contained in said trade organ.

Despite this, Mr. Pope characterizes his organ in the following language:

"A magazine known as "Automobile Topics" which is now considered as a trade authority in this industry."

Mr. Pope makes no mention of the extent of his circulation, the number of paid subscribers or the extent of his advertising. In fact the affidavit seems to be absolutely devoid of the size or his organ or of the effect it has on the industry.

The entire affidavit seems to be based upon a single survey made by him which he endeavors to impress this Court as typical of the entire industry.

A close study of the sources from which he has derived his information and the broadness of the inquiry will clearly disqualify it as befitting any consideration by this Court.

The questionnaire referred to by Mr. Pope has been sent out to 500 dealers. Mr. Pope characterizes these 500 dealers in the following language:

"That in an endeavor to determine conditions and more particularly on or about June 12, 1934, your deponent forwarded a questionnaire to 500 dealers distributed throughout the United States both as to territorial location and [fol. 229] representation with respect to the various makes of automobiles as set forth in Exhibit A attached hereto and made a part hereof.

"This distribution of dealer names was effected according to a system which has been used over the past ten years in an effort to secure representative opinions constituting in effect a cross-section of the dealer viewpoint for the country as a whole."

No mention of any kind is made by Mr. Pope as to how his system arrived at a strata of 500 dealers to represent approximately 45,000 dealers throughout the nation. His own admitted results clearly display that his questionnaire could never have been sent to a true cross-section of dealers.

The reasons are quite obvious. 353 replies were received, of which 268 or 76% were received from cities and towns of less than fifty thousand population. 85 or approximately 24% were received from communities of more than fifty thousand in population. Inasmuch as more than 85% of all automobiles sold are sold in communities of over 50,000 in population, we find that 24% of the responses come from areas representing 65% of the sales. How this can be said to be a true cross-section of the dealer viewpoint of the country in light of such facts is hard to conceive.

If 85 responses were received from metropolitan areas of over 50,000 where approximately 30,000 dealers are engaged, it is most difficult to conceive how the reaction and response of approximately ¼ of 1% of these dealers could truly affect the sentiment and reaction of all such dealers. [fol. 230] In light of the fact that the survey is obtained from such an infinitesimal portion of all dealers, the observations made should be completely disregarded by this Court.

The survey made by Mr. Pope cannot conceal, however, that approximately four out of five of every responding dealer to his survey clamor for enforcement of the Code, setting forth that there was not sufficient enforcement. Certainly this demonstrates that compliance is the exception and violation the rule.

In the closing portion of Mr. Pope's affidavit, he states:

"The tabulation shows that for the first six months of 1932, a total of six hundred sixty-three thousand, six hundred and twenty-five (663,625) registrations of new cars were made; that in the first six months of 1933 there were

six hundred eighty-two thousand, three hundred and sixty-seven (682,367) registrations of new cars made. For the first six months of 1934 there have been nine hundred ninety-five thousand, one hundred and twenty-one (995,121) registrations of new cars made. This substantially shows that the retailing business of this industry has advanced by leaps and bounds since the Code was adopted."

Mr. Pope rests his case on the mere statement of these statistics and would have this Court believe that the enormous advance from 682,367 registrations of 1933 to 995,121 registrations in 1934 has been caused entirely by the Code of Fair Competition for the Motor Vehicle Retailing *Code.* [fol. 231] Nothing in fact could be more removed from the truth. I will clearly demonstrate to this Court that if no Code of Fair Competition for the Motor Vehicle Retailing Trade had ever existed, the advance in the sales of new automobiles would have been as great or considerably greater than that demonstrated by these figures. To prove the truth of this latter statement, we must understand the background of the automobile industry.

The great consuming American public has in the past ten years consumed approximately four millions of automobiles every year. The statistics published by the National Automobile Chamber of Commerce indicate the following production of motor vehicles for the past ten years.

Year	Total Motor Vehicles Produced
1922	2,646,229
1923	4,180,450
1924	3,737,786
1925	4,427,800
1926	4,505,661
1927	3,580,380
1928	4,601,141
1929	5,621,715
1930	3,510,178
1931	2,472,359
	39,263,699

For the ten year period, including the years from 1922 to 1931 inclusive, approximately forty million cars have been produced or an average of approximately four million cars

a year. It is a conceded fact that more than 60% of all cars sold are sold in the first six months of the year. In other words, the normal consumption by the purchasing American public for the first six months of the year would [fol. 232] be approximately 2,400,000 cars.

The figures cited by Mr. Pope clearly demonstrate the complete paralysis of the wheels of industry and the purchasing power of the American public with respect to items other than the bare necessities of life resulting from the economic depression that we are presently in. The first six months of the year 1932 was approximately 26% of normal production. The first six months of the year 1933 was approximately 29% of normal production. The first six months of the year 1934 was approximately 41% of normal production. While it is true that the improvement from the year 1933 to 1934 was exceptional, the industry by no means has returned to normalcy. This increase can be directly attributable to the general improvement in specific parts of the country through the upward trend or movement of business by the Recovery Program of the President of the United States. We find that in the badly stricken areas of the South and Southwest where the Government saw fit to expend either through the forms of loans or other governmental ventures vast sums of money, enormous improvement was reported in the sale of new cars. On the other hand in the large metropolitan areas where little relief in proportion to other parts of the country was afforded, new car sales have not fared as well. The best illustration of this is the Metropolitan Area of the City of New York.

Sherlock & Arnold, Inc., recognized publishers of automobile statistics report that the first seven months sales in the respective years, 1932, 1933 and 1934 for the Metro- [fol. 233] politan Area of the City of New York is as follows:

1932	63,170
1933	66,915
1934	66,445

The complainant seeks redress in this court because of this experience in the operation of the Code in the Metropolitan Area of the City of New York and what is more significant of the true operation of the Code in this area

than the fact that registrations in this area have fallen off 470 cars over that of the year 1933. It is most significant to note despite the tremendous improvement of industrial conditions throughout the nation, despite the general improvement in the sale of new cars throughout the nation of approximately 40%, new car sales in this area with the operation of the Code have fallen.

Another very logical development of this situation can be readily understood.

In periods of dire distress such as we have experienced in the years 1932 and 1933, the public had confined their purchases mainly to the bare necessities of life such as food, shelter and clothing. Articles of convenience such as automobiles, radios, pianos, etc., are purchased with extreme caution and in most instances, in cases of necessity only. Consequently such articles sustain the greatest loss of trade. However, automobiles do not last forever and an abnormally low sales for years indicate that the bulk of the automobiles on the streets are many years old [fol. 234] and for the most part in dilapidated conditions. Automobiles in the last decade have rapidly begun to fill a need bordering on necessity. This is so true that after a nation has abstained from purchasing to the degree that this country has for the last two years and made their old automobiles serve their purposes, the first improvement of industrial activity would naturally bring forth a substantial improvement in the sales of automobiles.

Consequently if no Motor Vehicle Retailing Code had ever been promulgated, the year 1934 and the year 1935 would have enjoyed a considerable improvement over the abnormally low years of 1932 and 1933.

As a matter of fact it is the contention of the complainant that if the Motor Vehicle Retailing Code had never been promulgated, considerably more new cars would have been sold because the objectionable feature of the price regulating provisions of the Motor Vehicle Retailing Code have seriously retarded the sale of new cars. This can be easily seen when we consider that a prospective purchaser of a new car who offers his used car in trade finds that he cannot secure a true and honest value for his automobile because of the arbitrary "average method" used in fixing maximum used car allowances and as a result, he abstains from purchasing. If this restraint did not exist

and every prospective purchaser would be able to get a true and honest and fair value for his trade-in, he would undoubtedly be more disposed to purchase.

[fol. 235] Therefore the Code of Fair Competition for the Motor Vehicle Retailing Trade has seriously impeded the sale of new cars.

With respect to the City of New York, it is most amazing to realize that in the year of 1933 fraught with the most serious problems of financial distress, bank closings, enormous number of failures, more cars were sold than in the much improved year of 1934. Something must be responsible for this peculiar reversal of natural trends. I maintain that the Motor Vehicle Retailing Code is more responsible for this condition than any other factor.

In conclusion, I believe it is quite obvious that the Motor Vehicle Retailing Code has lent no aid to the improvement in the sale of new automobiles either in the entire United States at large or the Metropolitan Area in the City of New York.

[fol. 236] Affidavit of Oscar P. Pearson

The entire affidavit of Mr. Pearson is devoted to establishing the fact that there has been a substantial increase in the production and sales of new automobiles in the first months of the year 1934. The facts and arguments set forth in detail with reference to the affidavit of Hiram Bates Post logically apply to this affidavit.

Mr. Pearson recognized that in submitting the affidavit in behalf of the defendant he created a wrong impression that the increase in sales was due primarily or partially through the operation of the Code of Fair Competition for the Motor Vehicle Retailing *Code.*

In a letter addressed by Mr. Pearson to myself dated August 21, 1934, in response to the question "Do you feel that volume of new car sales involving trades of cars manufactured prior to 1932 would have increased without dealers' code?" he responded:

"We do not know that a recovery in general business retail sales would undoubtedly have shown increases even without a dealers' code."

In order to clearly establish that the Code of Fair Competition for the Motor Vehicle Retailing Trade in no way

contributed towards the increase of new automobiles in the first six months of the year 1934, I sent the following tele- [fol. 237] gram to practically every manufacturer of a new automobile:

"In connection with our suit to test the validity of retail automobile dealers code Oscar P. Pearson of your National Automobile Chamber of Commerce submitted affidavit containing comparative sales figures tending to show recovery in the automobile business due to dealers code. In order to clarify situation would appreciate receiving answers to following questions:

(1) Do these figures contain truck sales not affected by Code?

(2) What percentage of increased business do you attribute to spending of government funds in distressed areas of south and southwest?

(3) Do you attribute increase in new car sales to dealers code?

(4) Do you feel that volume of new car sales involving trades of cars manufactured prior to 1932 would have increased without dealers code?

(5) In your opinion does guide book retard sales of high priced automobiles?

(6) Where your dealers volume has been in excess of 1933 has net profit in most cases increased proportionately?

(7) Have your dealers in proportion to their new car sales a smaller average used car stock in 1934 as compared with 1933?

Any additional comments will be greatly appreciated. Please wire via Postal Telegraph night letter collect.

Spielman Motor Sales Co., Inc."

This telegram was sent but two days ago but three responses have been secured. I believe upon the submission [fol. 238] of this affidavit several additional responses will be had.

The following responses were received:

Auburn, Ind., Aug. 21.

"Your telegram will be placed before the President of our Company upon his return to the factory.

Auburn Auto Co."

"Lansing, Mich., Aug. 21.

"We regret lack of time and study do not permit us to answer all of your questions but we do most emphatically think that guide book has retarded sale of higher priced automobiles.

Reo D. Bates, President."

"August 21, 1934.

(Letter)

"Mr. David Spielman,
Speilman Motor Sales Co., Inc.,
220 Greenpoint Avenue,
Brooklyn, N. Y.

DEAR MR. SPIELMAN:

In the absence of Mr. Reeves your telegram of August 21st has been referred to the writer for a reply.

I shall answer the questions in the order in which they were put:

1. Do these figures contain truck sales not affected by code?

Answer to No. 1: Yes, the retail sales figures compiled by us each month contain retail sales of trucks with a capacity greater than ¾ ton.

2. What percentage of increase in business do you attribute to spending of government funds in distressed areas of south and southwest?

Answer to No. 2: We have no data on this point, but undoubtedly a large proportion of new car sales were made [fol. 239] as a result of government funds distributed to the distressed areas.

3. Do you attribute increase in new car sales to dealers code?

Answer to No. 3: No. We compile monthly retail sales totals as a matter of information for our members. We do not place any interpretation on them, nor do we ascribe the increases shown as being due to any particular cause.

4. Do you feel that volume of new car sales involving trades of cars manufactured prior to 1932 would have increased without dealers code?

Answer to No. 4: We do not know. With a recovery in general business retail sales would undoubtedly have shown increases even without a dealers code.

5. In your opinion does guide book retard sales of higher price automobile?

Answer to No. 5: I am not qualified to express an opinion on this question.

6. Where your dealers volume has been in excess of 1933 has net profits in most cases increased proportionately?

Answer to No. 6: We have not made a study of dealers' net profits, and, hence, do not know.

7. Have your dealers in proportion to their new car sales had a smaller average used car stock in July 1934 compared with July 1933?

Answer to No. 7: We do not compile figures on used car stocks for the entire industry. However, we receive reports on used car sales as well as new car sales by the dealers of a number of manufacturers. During the first six months of 1933 there were sold by this group of dealers 154 used cars for every 100 new cars. During the first six months of 1934 used cars were sold by this same group in the amount of 146 for every 100 new passenger cars.

If there are any further questions we shall be glad to [fol. 240] give any factual data we have available.

Very truly yours, National Automobile Chamber of Commerce. (Signed) S. P. Pearson, Manager, Statistical Department."

Alvin MaCauley, President of the Packard Motor Car Company and also President of the National Automobile Chamber of Commerce, in his report to his stockholders as of July 1, 1934 stated:

"The operations of the Motor Vehicle Retailing Code, which, as enacted, may work to the advantage of lower priced cars but certainly operates to the great disadvantage of all high priced cars."

One thing is certain. The sale of high priced cars has very seriously been retarded by the arbitrary fixing of low maximum prices for trade in used car allowances.

The trade in principles of the Code of Fair Competition

with respect to high priced cars is brutally unfair. A purchaser of a Packard in 1929 paying therefor almost $5,000, expecting to use the automobile for at least five years, would find that he could receive for his automobile in trade in the year 1934 for another Packard of equal value but $380. Cars of this character are usually maintained in excellent condition by experienced chauffeurs so that the automobile at the elapse of five years is still comparatively in good condition. To expect the purchaser of a new $5,000 Packard to receive the same trade in allowance for his 1929 Packard as he would receive if he were to purchase a $700 Ford is ridiculously unsound. The dealer's margin of gross profit on high-priced cars invariably runs considerably greater than the margin of a dealer [fol. 241] on a low priced car. The average Packard dealer receives approximately 28% of the factory list price as his margin of profit while approximately 22% is received by a Ford dealer. On a $5,000 car, the 6% difference would represent approximately $300. If the Packard dealer could offer this $300 to the prospective purchaser, he would undoubtedly be able to consummate a greater number of sales and retain for himself a profit of approximately $1,100 upon such sale. The purchaser who is offered about 7% of the original price paid for his automobile feels indignant and either purchases a lower priced car or in most instances contents himself with a further use of his old automobile. Such rigid policies with resulting inequities must retard sales, must retard employment, and must delay the recovery program.

It is to be particularly noted that the sharp increase in the volume of new car sales in the months of June and July has been caused by two factors (1) manufacturers of low priced automobiles drastically reduced the prices of their cars and (2) flagrant violations of the Motor Vehicle Retail Code throughout the nation removed for the most part the retarding effect of the price regulation provisions of the said Code.

As the time progressed since the inception of the Code, more and more dealers felt the sharp pinch caused by the arbitrary provisions of price regulation in the Motor Vehicle Retailing Code. As their problems became acute, more and more dealers commenced to violate so as to retain their volume of new car sales. The result has been

[fol. 242] almost a complete collapse of compliance with the price regulation provisions of this Motor Vehicle Retailing Code so that for the most part these provisions are totally ignored and the natural restraint originally had by such provisions have almost been totally abolished by such wide-open and flagrant violations.

[fol. 243] Affidavit of Harold H. Straus

There is one point that requires refutation in this affidavit. The question at issue in this present application at bar is the price regulations of the Code of Fair Competition for the Motor Vehicle Retailing Trade. These price regulations are determined thru the fixation of maximum prices on used car trade-in allowances and thru arbitrary fixation of prices for the sale of new cars. One is equivalent to the other. Both are necessary in most instances to require a complete regulation of price, on the sale of a new car because more than 85% of all sales contemplate trade-ins. While the Magistrates Court proceedings contemplate a situation involving a discount, there is pending at the present time in the office of Mr. Hulett two situations upon which there is threatened action against the complainant contemplating used car trade-in allowances. The problem and question is one and the same and the attempt on the part of Mr. Straus to draw this distinction is to avoid the issue.

Of course I, as the President of the complainant corporation emphatically deny the truth of the accusation made in the Magistrates Court proceedings against the complainant.

[fol. 244] Form Affidavits Submitted by Fifty-Seven Dealers

The defendant has submitted affidavits by 57 dealers to establish that the operation of the Code has been preeminently successful.

Inasmuch as all of the affidavits are identical, it would be wise to discuss and treat with these affidavits as one.

Analysis of Who Signed These Identical Affidavits

The controversy at bar essentially affects the Motor Vehicle Retailing Trade in the City of New York. There are

approximately 750 dealers engaged in the Greater City of New York in the sale of new motor vehicles. It is most significant to note that only 25 of the 57 affidavits submitted have been executed by dealers engaged in the Greater City of New York. It is certainly difficult to reconcile that the Administrator, Mr. J. B. Hulett, who has made strenuous efforts to secure the execution of as many affidavits as is possible in this area would have been successful in only 25 instances out of approximately 750 in securing affidavits that characterize so delightfully the results from the operation of the Code of Fair Competition. Think of it—25 out of 750—about 3% of the dealers engaged in this Greater City of New York.

I do not desire to cast any reflection upon the method employed to secure these affidavits. I have personally [fol. 245] spoken to more than 100 dealers engaged in this City of New York and with but a single exception everyone has condemned the operation of the Code, its inequalities and the impossibility of its further enforcement. As a matter of fact, three of the dealers who have signed this form of affidavit on behalf of the defendant emphatically told me that the Code had drastically failed of its purpose; that compliance was rare; and that the strict adherence to the Code as was the case at the time of its original inception had seriously impaired the sales of their automobiles. These very dealers who so very effusively condemned the Code did not hesitate to sign the form affidavit. These three men had no cause to distort the truth in their discussion of the matter with me but it is quite certain that there was a very definite inducement for their execution of the affidavit on behalf of the Commissioner, Mr. J. B. Hulett.

I. Koepel of E. Koepel, Inc. told me emphatically that all the dealers realized that the code was an absolute failure but that only a fool would "stick his head out" and incur the enmity and wrath of the Commissioner, Mr. J. B. Hulett. He advised me to do what all other dealers are doing and that is to carefully offer discounts and rebates to prospective customers who would not report such violations. This man did not hesitate to sign the form affidavit.

Stephen Bayers of Bayers Chevrolet Co., advised me personally that he felt the Code operation was a failure. He also told me that being a hero might cost a good deal; that I was a fool to subject myself to the possibilities this pres-

[fol. 246] ent litigation entailed. He also advised me that it was wise to play along with the times although he was absolutely convinced the entire Code would be abandoned shortly. He advised the logical thing would be to cry in terms of supporting the Code but to actually conduct the business on the basis where no "chiseler" would derive any sales from his customer. In other words, he frankly advised me to assume a two-faced role, i. e., lauding the Code while simultaneously violating to retain business.

Thomas Drago of the Mutual Motor Sales, Inc., so short a period as three weeks ago, advised me that the contention made on behalf of the complainant was absolutely correct and he would voluntarily execute an affidavit on behalf of the complainant if he could secure the consent of one Theodore Southworth, the dealer through whom the Mutual Motor Sales, Inc. purchased their Pontiac automobiles. Apparently Mr. Drago has very seriously changed his opinion in a very short time.

All three of these men frankly admitted that they were in apprehension of the Commissioner, Mr. Hulett, because of his practices and methods and that they would not like to do anything that would incur his displeasure and consequently incur his abuse.

Another affidavit is executed by one L. F. Jacord of L. F. Jacord & Co., a used car dealer. Used car dealers are not at all affected by the price regulation of the Code of Fair Competition. There is no restriction of any kind upon what price a used car may be sold. Even in instances where a [fol. 247] used car is traded in in the purchase of another used car, the dealer may allow any price for the trade in by simply varying the price of the sale of the second used car. While theoretically the used car dealer is bound by the trade in prices, in practical effect no such restriction exists. Of course such a dealer has had no experience with the changes of price regulation upon his business. Four other New York City dealers are engaged in the sale of high priced cars. If their experience is the experience of all other dealers then their experience, in the expression of Alvin Macauley, President of the Packard Motor Car Company, must be expressed:

"The operations of the Motor Vehicle Retailing Code, which, as enacted, may work to the advantage of lower

priced cars but certainly operates to the great disadvantage of all high priced cars."

W. E. Tarr, representing the New York retail branch of the Studebaker Sales Corporation of America which is a factory branch of the Studebaker Corporation signed this form affidavit. We have been reliably informed that this does not truly represent the opinion of the Studebaker Corporation and that the execution of this affidavit was done on his own behalf and represents his opinion exclusively.

It is not difficult to realize the circumstances under which most of these affidavits were secured. I do not believe that there are ten dealers in all of the 750 dealers in the Greater City of New York that are not in fear of the Commissioner, J. B. Hulett, and his practices and methods. A request of Mr. Hulett or from his office is tantamount to an order. The [fol. 248] execution of these affidavits may well be explained by the fact that the ones who signed did so irrespective of the true facts to ingratiate themselves into the favor of the Commissioner, J. B. Hulett. I have been informed by a Ford dealer engaged in the City of New York that a representative of Mr. Hulett's office called at the showroom of the Ford dealer, pressed the simple question "Are you in favor of the Code" and after securing an affirmative answer (which was the only answer to be given to a representative of Mr. Hulett's office) was asked to sign the affidavit without even reading the affidavit. Mr. Hulett's representative then advised the Ford dealer that he had more than 50 stops to make to secure the execution of 50 similar affidavits. Certainly such methods of not even affording the signer of the affidavit an opportunity of even reading its contents cannot be said to be a true reflection of the operation of the Code and the conditions resulting therefrom.

Of the affidavits secured from dealers operating outside of the Metropolitan Area of New York, fourteen operate garages as their principal source of income. The agency for the sale of new cars constitutes but an incident to their business from which they derive their livelihood. The volume of business derived by such dealers constitutes so small and minute a portion of all business done in their respective communities that their opinions should be greatly discounted.

[fol. 249] Analysis of the Contents of the Affidavit

The form affidavit, has been signed by 57 dealers, is the product of one man who has endeavored to display to this Court the Utopian results of the operation of the Code of Fair Competition for the Motor Vehicle Retailing trade. The conclusions are extreme and unquestionably biased. The fact that not one of the 57 signers varied or altered a single word with respect to the contents of the affidavit should clearly evince the fact that such signers would have been disposed to sign *any* affidavit if it would have served the purpose of the defendant and, incidentally, J. B. Hulett.

The affidavit, after the preliminary statement of name of the affiant, his address, the business with which he is affiliated, the car agency that such business retained, number of years engaged in such business, continues with a discussion of the operation of the Code. The affidavit states:

"That he is familiar with the conditions prevailing in the industry prior to and since the approval and operation of the Code of Fair Competition for the Motor Vehicle Retailing Trade."

"That deponent has a substantial investment in the automobile business.

"That despite the fact that enforcement of the code regulations has not yet reached the degree of efficiency, conditions in the motor vehicle retailing trade have, in deponent's opinion, improved since the approval and operation of the Code in that 'cut-throat competition has been eliminated.'"

[fol. 250] A frank admission was made that the Code was not being duly enforced. The statement that cut-throat competition was being eliminated is absolutely without foundation. As a matter of fact, upon the inception of the Code, practically every dealer, including the complainant, though their opinion of the Fair Trade Practices were similar to that of the complainant, afforded the operation of the Code a fair opportunity. At that time compliance was almost complete. At that time such complete compliance caused such a complete retarding of sales that those dealers that would have been unable to stand the financial stress of loss of business were compelled, through urge of financial necessity, to cheat. As a matter of fact, there is more open

violation of the Code today than at any time before. Though there is flagrant violation of the Code provisions, cut-throat competition does not for the most part exist. Most dealers, in recent years, because of the lack of new business, have become extremely cautious trade ins and while transactions are completed with smaller margins of profit than in more prosperous years, it is unusual for a dealer to sustain a loss upon a transaction. While it is true that the Code of Fair Competition ensures abnormally high profits under certain circumstances to the dealer in the operation of the Code the dealer stands to sustain great losses because the number of sales is greatly reduced. While the Code, if enforced, might eliminate a good deal of cut-throat competition, it would just as effectually put most dealers out of business because it would discourage a vast number of new sales, the profit of which is necessary if dealers are to remain in business.

This Code of Fair Competition, however, does not prevent [fol. 251] cut-throat competition in most instances. Because the Code discourages many sales, the desire for most dealers to compete sales is extremely great, the result of this being that most dealers, irrespective of the condition of an automobile to be used as a trade in, will allow the maximum price under the Code provisions for such trade in. Frequently, the true value of such trade in is so much less than such maximum allowance that a severe loss is occasioned to the dealer. Many dealers have told me that the bulk of buyers of new cars, before even displaying the car they seek to trade in, demand the maximum allowed under the Guide Book of this Code of Fair Competition. Such circumstances expressly within the provisions of the Code of Fair Competition stimulate rather than retard cut-throat competition. The maximum allowance distinctly tends to become the minimum allowance under such Code operations.

The affidavit then proceeds to state that the Code is effectual because:

"(2) Deponent's firm's business is in a healthier condition."

While the pecular benefits pertaining to the business of each of the affiants is not known to me, most of the dealers that

I have spoken to have lamented the fact that his business has not improved sufficiently to warrant an improvement in the financial status of their respective affairs.

[fol. 252] The statistics of Sherlock & Arnold, Inc., recognized publisher of facts and statistics on the motor vehicle industry, indicate that there has been less automobiles sold in the metropolitan area of the City of New York in the first six months of 1934 than in the first six months of the year 1933. We all concede the year 1933 was a difficult one. It is hard to reconcile a substantial improvement of the financial condition of the dealers engaged in the metropolitan area of the City of New York in the year 1934 over that of the year 1933. These facts, taken in light of the fact that there is a considerably greater number of dealers in the metropolitan area of New York in the year 1934 than in the year 1933, due to the expansion program of most of the large manufacturers of automobiles, would clearly indicate that with the reduced volume of business to be spread over a greater number of dealers, financial distress should become more evident.

The affidavit continues to state that the Code of Fair Competition for the Motor Vehicle Retailing Trade has been responsible for

"3. Deponent's firm is employing more people than it did prior to the Code and its payroll shows a substantial increase.

"4. Working conditions such as hours of labor have improved."

There can be no question but that adherence to the President's recovery program would have occasioned an increase in employment and a reduction in the hours of each employee. The Motor Vehicle Retailing Code is not responsible for this because such a condition existed upon the signing of the President's re-employment agreement more commonly known as the "Blanket Code." The objection to the Code lies entirely to its price regulation provisions, well [fol. 253] as complied with, the labor provisions of this code.

The affidavit continues to state that the code is responsible for

"5. Purchasers are now getting fair values for their used cars in trade and greater values in the new cars they buy."

I have at great length indicated that the Code has very seriously retarded new car sales because of the inequity resulting to purchasers of new cars seeking to trade in old cars worth more than the average would be under the Code. It is not necessary at this time to discuss this at greater length, but in passing it should be clearly indicated that the public by the very intention of the drafters of the code were to receive the least benefit, in fact deprived of the true value of their property.

The affidavit makes much of the fact that prospective purchasers get greater values in new cars they buy. The Code is in no way responsible for this. Factory prices are established by manufacturers who are not in any way bound or affected by the Motor Vehicle Retailing Code.

The affidavit further states that the Code is responsible for

"6. Dealers are prevented from selling new cars at below cost by not being permitted to allow a customer more than the fair value of a customer's used car traded-in."

It is quite certain that the fair trade practice provisions that regulate the prices to be allowed on trade-in if enforced would prevent any dealer, in most instances, from allowing an excessive amount for trade-in, but it does permit the dealer to make a high exorbitant profit by complying with the provisions of the Code. The provision was designed to yield the dealer exorbitant profits, but unfortunately resulted in retarding an enormous amount of sales, [fol. 254] and consequent losses of profits to dealers.

The affidavit further provides that the Code is responsible for

"7. The inflation of list prices of new cars to provide for an over-allowance on used cars taken in trade is being eliminated, thus placing competition on the basis of intrinsic value rather than used car allowance to the benefit of all concerned.

"8. Deponent because of the Official Used Car Guide Book has suffered less losses than at any time prior to the approval of the said Code in the trade-in and sale of used cars."

Non-compliance is prevalent, and there is hardly a dealer that has not in some instances allowed discounts or trade-in

allowance in excess of Code provisions. The manner in which this violation of the Code was effected was in most instances through the inflation of expense items. The prospective purchaser was usually induced to deliver a check in full payment of his purchase and received cash as a discount from the dealer. The dealer thereupon "padded" his respective expense accounts to absorb this cash outlay. I am absolutely convinced that if an analysis be made of the books of the 57 affiants and a study made of the expense accounts in comparison with the same accounts as of last year, an enormous increase will be noted in most accounts. Compliance cannot be had because the Code is fundamentally and economically unsound, because it does not permit the prospective purchaser, in many instances, to receive a fair value for his trade-in. While isolated instances of purchase and sale may occasion unusual profit to a dealer, by and large his business as a whole has seriously suffered by the Code operation.

The affidavit then proceeds to state:

"The suspension of this Code and especially of its cost protection features, in the form of an injunction by this Court, would immediately throw all dealers into vicious [fol. 255] cut-throat competition more brutal than ever before that could only result in the complete destruction of all the recovery gains that have been accomplished since the enactment of this Code."

There can be no question but that violation today is more common than compliance. John B. Hulett in his own affidavit admits of receiving approximately 1,000 violations. It is therefore reasonable to assume that the Motor Vehicle Retailing Trade in the metropolitan area of New York is not operating under the price regulation provisions of the Code but is today operating in spite of such provisions. With these provisions utterly disregarded, we find no such havoc that is depicted in this paragraph of the affidavit. As a matter of fact, sales in the months of July and August have run considerably ahead of the year 1933. We believe that the drafter of this affidavit endeavored to create a "bugaboo", so as to instill fear into this Court of severe and drastic consequences in allowing the relief sought by the complainant. Such fears are truly without ground.

In conclusion, we feel that the character of those signing the affidavits, the manner in which the signatures to those affidavits were secured, the extreme statements admittedly unsound made therein, so taint the tone and character of the affidavits as to merit no consideration by this Court in a determination of the issues at bar.

Analysis of Affidavit of K. J. Ammerman

K. J. Ammerman acted as Deputy Administrator in administering the Code of Fair Competition for the Motor Vehicle Retailing Trade from October 1, 1933 until July 26, 1934. Briefly, the progress of code administration, as the government's representative, has been entirely the responsibility of Mr. Ammerman. While I do not question [fol. 256] his integrity, it is only logical to assume that he would endeavor to support the justification of the Code and its provisions that he has administered for so long a period.

An analysis of his affidavit, however, discloses that he is an extreme enthusiast, tending to grossly exaggerate conclusions that do not normally fall from the facts at his command.

This can be simply illustrated by the extravagant language he employs. At the outset of his affidavit, he endeavors to depict the conditions that existed immediately prior to the adoption of the Code of Fair Competition for the Motor Vehicle Retailing Trade. His language states:

"When the trade was backed to the wall; when the members of the industry were faced with bankruptcy, the employees faced with loss of their jobs and the remaining few with a reduction in pay; when revolt was in its ranks; when the industry's standards were repudiated by those who entered the trade during this critical period and were not alone satisfied to conduct their own business illegitimately but invited others to participate and rally under its folds, and by standing together in dishonor, supporting each other in perpetrating a shame which was too much to face alone; when normal credit operations were dissipated; when the economic consequences were never considered in 'putting over a deal'; when profits were forgotten to attain volume; when every attempt to stem the tide of financial ruin prove disastrous and when voluntary sacrifices of a few were to no avail—the members of this industry turned to

the Federal Government for aid and assisted in preparing a program for recovery."

This statement of conditions, immediately preceding the adoption of the Code, is absolutely without fact. The automotive industry and the retail dealers had enjoyed a sharp improvement over the preceding year for five months prior to the adoption of the Code. Their fare had been substantially improved and the upward movement in the sale of new automobiles was very definitely established. This can best be established by the statistics of the National Auto- [fol. 257] mobile Chamber of Commerce of new passenger car and truck registrations for the months of the year 1932 compared to the months of the year 1933 immediately preceding the adoption of the Code.

Month	1932	1933
May	149,978	181,167
June	166,628	197,444
July	118,919	216,302
August	108,538	207,460
September	96,860	189,245

It is to be particularly noted that the two months immediately preceding the adoption of the code, the new cars sold in those respective months was approximately twice the number of cars sold in the corresponding months in the preceding year 1932. How Mr. Ammerman could conceivably picture the situation in the light that he has, in the face of these facts and statistics, is very hard to conceive. We believe that he has been misled rather than that he is desirous of misleading this Court.

It is also very interesting to note the rather rash statements of improvements affected by the Code in the language of Mr. Ammerman. Mr. Ammerman, referring to the effect of the operation of the Code, states:

"They (dealers) have been operating under its provisions, and with increased volume of sales are now realizing profit on capital investment. Bankruptcy has been decreased; failures are practically unheard of; nearly every unemployed member of that trade has been re-employed; vacant stores have been re-occupied; credit has been established, and in general the entire aspect is one of a glorious future."

When even the most rabid proponent of the Fair Trade Practice provisions of this code admits that there is a large [fol. 258] number of violators and that observance of the Code is not entirely complete, it is difficult to further understand Mr. Ammerman when he attributes such glorious results from the operation of this Code.

Those two simple quotations should manifest the tone of the deductions made by Mr. Ammerman throughout the course of his affidavit.

Permit me to point out some of the improper deductions and conclusions made by Mr. Ammerman.

Mr. Ammerman refers to the automobile as a "necessity." While it is true that the use of the automobile has become a very distinct phase of the social and economic life of most of the people of the United States, the greater portion of the use of the automobile is still for pleasure purposes and as such it still borders on the luxury class, in most instances. This is particularly true when it is realized that all commercial vehicles over three-quarters of a ton capacity are not subject to the price regulatory provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade. Consequently the bulk of commercial vehicles (only 27.6% of commercial vehicles are of three-quarter ton capacity and less) are not affected by price regulation.

This fact can be clearly demonstrated when we find that in the years 1932 and 1933, the purchase of new automobiles dropped to 25% and 29% respectively of the normal consumption of four million cars per year. This normal consumption of four million cars per year is based upon an average of the ten-year period from 1922 to 1931 inclusive. Mr. Ammerman seems to ignore the fact that in any economic depression, articles that are anything but absolute necessities of life feel the greatest effect of the depression. [fol. 259] This fact alone is responsible for the sharp decrease in the purchase of automobiles in the years 1932 and 1933. His statement, extreme as it is, is as follows:

"Their (consumer) demand was for a lower priced car and whenever a used car was traded in on the purchase of a new motor vehicle, the consumer usually demanded an amount in excess of the actual value of the used car he owned. Believing as many dealers did, a volume of business would increase their profits, they acceded to the de-

mand of the general public and in their desire to complete a sale of a new motor vehicle very often granted an allowance on an old car which was far in excess of its true value and when re-sold by them they of necessity took a heavy loss. These competitive abuses continued until approximately 90% of the automobile dealers in the United States were either bankrupt or in such a financial condition that the period of their active business life would not exceed more than five or six months."

If the competitive abuses were so frequent as Mr. Ammerman will have the Court understand, it is difficult to conceive that any dealer would have been able to remain in business the two years (1932 and 1933) when the general demand for new automobiles fell to approximately 25% and 29% respectively of normal demand. If the dealers did not maintain a fair margin of profit on the small number of cars that they sold, they would have had to rapidly close their doors. The automotive industry sustained no greater loss nor recorded no greater bankruptcy record than the average industry throughout the entire nation.

The rash statement by Mr. Ammerman that the dealers had been subjected to such abuses that 90% were bankrupt and that few could remain in business more than five or six months, seems absolutely ridiculous. He does not state when their condition arrived at that point and particularly avoids reference to the fact that the extremely poor business was sustained for an additional period of over two years.

[fol. 260] It is true that the automotive industry, like all other industries throughout the nation, was compelled to become more efficient, effect more economies and generally to conduct their respective businesses in a more business-like manner due to the sharp recession in motor vehicle sales.

The problem was very simple. The great mass of the American people had become seriously impoverished and while their was a tremendous desire to purchase new cars, the wherewithal was lacking. The solution to the problem was increased employment in all industries and a reduction in the price of automobiles made possible through greater efficiencies in automobile production. The Motor Vehicle Retailing Code in no measure accomplished the re-

covery in the automotive industry. In the language of Alfred P. Sloan, Jr., President of the General Motors Corporation in a statement made on June 30, 1934 to the stockholders of that corporation:

"In the quarterly reports that have been sent to stockholders during the past twelve months, as well as in the annual review of the year 1933, attention has been called to the effect on the Corporation's position of its compliance with the national recovery programs, particularly with respect to the policies of the National Recovery Administration. Hours have been shortened; wages have been raised; important increases in the cost of materials have had to be absorbed. Increased costs have resulted not only from the direct influence of higher levels of expense, but through the indirect effect of a lowering in operating efficiency. On the other hand, the economic influence of these national recovery programs on individual purchasing power has, in principle, been to reduce the spread between the real cost of living and real income. That being the case, manifestly, purchasing power is not available to sustain selling prices commensurate with increased operating costs. The question of the profit margin of industry therefore arises, although these adverse influences are partly offset, at least in some instances, by increased turnover.

"This set of circumstances reflects the trend of industry in general, and although unsatisfactory, should not be accepted by industry as a set of conditions under which it [fol. 261] must necessarily operate permanently. On the contrary, it should be looked upon as a challenge and an incentive to regain what has been lost, to establish even higher standards of operating efficiency, on the one hand and to develop new and more effective products, on the other. The objective should be not merely a more favorable relationship of cost to selling prices, but what is of more vital importance, real selling prices themselves must be reduced—they must be brought within the range of a greater number of buyers. In no other way can industry be stimulated to higher levels of activity—in no other way can the unemployment question be intelligently attacked—at least that is the thinking of General Motors and its approach to the problem.

Alfred P. Sloan, Jr., President."

Mr. Ammerman again makes a rash and unsupported statement when he states:

"This decline continued to a point where the capital investment of 1932 equalled approximately one-third of the capital investment of 1929."

There is absolutely no foundation in fact for a citation of statistics to bulwark this ridiculous proposition. If capital investment had dropped 66⅔%, it is reasonable to assume that at least that number of retail dealers would have been forced out of business. Such is not the fact. It is also reasonable to assume that the drop in capital investment of the dealer ran proportionately to the drop of the automobile manufacturers. Mr. Ammerman himself cites the following facts:

"The capital investment in automobile manufacturing was reduced from over $1,950,000,000 in 1929 to approximately $1,490,000,000 in 1932."

This drop is approximately 25% and not the preposterous figure of 66⅔% cited by Mr. Ammerman.

Mr. Ammerman makes another rash assertion without foundation in fact:

"In 1929 more than $75,600,000 was paid by the retail automobile dealer for rent or leases on the premises occu- [fol. 262] pied by them. In 1932 the reduction was in proportion to the percent of reduction in sales."

In 1929, 5,621,715 motor vehicles were produced. In the year 1932, 1,431,494 motor vehicles were produced. The 1932 production was approximately 25% of the 1929 production. Any fair thinking reasoning individual realizes that no dealer was successful in reducing his rent in any like proportion. It is conceivable that rents may have been reduced 15%, 20% or 25% but certainly not 75% in proportion to sales. Mr. Ammerman's statement is unquestionably without foundation.

Mr. Ammerman, however, makes one very significant point when he states:

"He (retail dealer) must be so located because of the exigencies of his business, for he is not alone a salesman of a sales agency but he services and repairs for the consumer the commoditiy he sells."

The retail dealer is immeasurably in a better position than the manufacturer of automobiles. He has a double-barrel gun to serve as the source of revenue. First, he derives a substantial source of income from the sale of new and used cars. Second, he derives a substantial income through the rendition of servicing and repairing of automobiles that he has sold. Throughout the depression, the public at large abstained for the most part from the purchase of new cars. They continued to use their old cars and in the course of time these old cars fell into disrepair. This was more so true during the years of depression, because old cars were not abandoned as readily as in years gone by. The second result was that the service department of practically every retail dealer enjoyed far better income than in previous years. The best illustration in recent years of this very fact is that in the year 1927 Ford Motor Car Company went out of production. Not until [fol. 263] 1929 did they offer to the public a new model. The dealer sustained himself for a period of almost two years almost exclusively from the income derived from the sale of parts and accessories and the rendition of service for repair. This definite source of income has been definitely ignored both by Mr. Ammerman and all of the other affiants in endeavoring to paint an aggravated picture of the unfortunate plight of the retail dealer. Mr. Ammerman endeavors to mislead this Court in citing elaborate figures of the unfortunate plight of the manufacturer of motor vehicles. He totally ignores and fails to advise this court that unlike the manufacturer, the dealer at all times had a constant source of income from his service department and the sale of parts and accessories.

Mr. Ammerman makes considerable of the discussion of "legitimate" dealers and "illegitimate" dealers, of "bootleg" dealers and "bootleg" deals. It is hard to understand what he means, because he does not cite a single illustration of what transactions are legitimate and what transactions are illegitimate. Prior to the adoption of the code, dealers in motor vehicles conducted themselves as all other dealers of other commodities. They could sell to whomever they pleased at such prices as they desired. How in the light of such facts a dealer could be characterized as legitimate or illegitimate is hard to determine.

Another extreme statement of Mr. Ammerman is as follows;

"Governmental supervision was the only means of saving the motor vehicle retailing industry."

As I have definitely proven in the statistics cited, the retail dealer throughout the nation was enjoying a vast improvement in business in the five months immediately pre- [fol. 264] ceding the adoption of the Code. As a matter of fact, the increase in volume of business of the year 1933 over the preceding year 1932 substantially dropped after the adoption of the Code. If we are to draw a deduction from this observation, we must come to the conclusion that the enactment of the Code seriously impaired the sale of new cars. The following statistics bear evidence of this fact:

Month.	1932.	1933.	Percentage of increase of 1933 over 1932.
May	149,978	181,167	18%
June	166,628	197,444	35%
July	118,919	216,302	103%
August	108,538	207,460	153%
September	96,860	189,245	132%
October	51,625	138,365	173%
(Price Provisions of Code Effective November 3)			
November	61,761	62,974	3%
December	109,472	83,755	23% (Minus)

Certainly an observation of the statistics would seem to indicate that a collapse of the sharp recovery enjoyed by the industry took place immediately upon the adoption and enforcement of the Code. One thing is certain, however, that a sharp increase of recovery was manifest for a long period before the Code was adopted, and consequently to attribute recovery to the Code is to draw a deduction that is remote from the truth.

Mr. Ammerman discusses government regulation and control as a panacea of all ills for the Motor Vehicle Industry. Unfortunately, the facts and statistics do not bear him out. Violation is rife; adherence to the code is rare. [fol. 265] This has been caused through the fundamental difficulty and error in establishing fictitious values for used car trade-ins. The Code provisions were based upon the theory that the public would pay high and exorbitant prices. Such is undoubtedly conceived in a fallacy of reasoning. As was stated by Alfred P. Sloan, Jr., the problem was to bring the purchasing power of the people close to the cost of living. The price regulation attempts of this

code sought to effect the very opposite by imposing an excessive burden upon the public.

Mr. Ammerman condemns the use of appraisal books in the past in the following language:—

"These appraisal guides as published were based on unsupported reports furnished by some of the dealers. But, in this manner they were able to establish an allowance price to suit their own desires and the consuming public was left with no available remedy except to side with those men in the manner prescribed by them to their mutual detriment."

We cannot entirely agree with Mr. Ammerman that it was to the mutual detriment of both public and dealer. Such guide books were for the advancement of the interest of the dealer. Mr. Ammerman then endeavors to show that the present guide book promulgated by the National Automobile Dealers' Association remedies the defects of the old guide book. This is absolutely false. The same fictitious manner of arbitrarily fixing a price apparently seems to be employed in the present guide book. As set forth in great detail in my original affidavit in this application, I conclusively proved that the National Automobile Dealers' Association had rejected sworn affidavits of used car sales that were to be used in the calculation of an average pursuant to the terms of the code. These sworn statements were rejected and returned to the sending dealers because they did [fol. 266] not meet with the whim and caprice of those that sought to fix fictitious values on behalf of the National Automobile Dealers Association. How the method of calculation and fixation of values can be different from that of the methods used with the old guide book is hard to discern. Like the old guide books, the values were first established. Then supporting data was sought to justify such valuation.

Mr. Ammerman in further describing the method employed to establish the maximum allowance to be permitted on the trade-in of used cars, states:

"By using these figures and in the manner prescribed by the Code an average was struck determining the average used car allowance granted by dealers during a given period of time. In this manner the consuming public and not the

dealer determine the maximum price to be allowed when the used car was used as a medium of exchange."

How Mr. Ammerman can conceivably say that the consuming public determines maximum price by striking an average, is hard to discern. An average must contemplate values below and above the average. To establish the average as a maximum figure is to deprive prospective purchasers owning cars worth more than the average of the true and honest value of their trade-in. Certainly the public was getting the short end of the trade.

Mr. Ammerman again generously states:

"Without having definite figures to show the trend of business today it is impossible to state definitely the actual value of the code as adopted by this industry and under which it is now operating. Surveys conducted by various agencies have definitely proven that the industry has benefitted to a large extent because of the code."

First Mr. Ammerman states that it is difficult to determine the actual value of the code and then states that there has been a number of surveys made. Who made these surveys? What is the conclusion arrived at? There seems [fol. 267] to be no supporting data in this affidavit. The scant surveys made by those submitting affidavits on behalf of the defendant in this case have been rank, lacking substance and without true foundation. For a government official who prides himself in the knowledge of the industry and in the survey that he has made as administrator of the code, general statements of this kind without even a reference to the specific survey made must truly taint the significance of his other remarks. I challenge Mr. Ammerman to produce one single responsible survey that would clearly attribute any improvement in the industry directly to the operation of the Code of Fair Competition for the Motor Vehicle Retailing Trade.

Analysis of the Affidavit of Jack Frost

Jack Frost, from his own admissions, is the outstanding statistician for the industry. He states:

"The monthly publication of the said official guide is prepared and published under my personal supervision and direction."

Much time and detail must be devoted to the assertions made by Mr. Frost to demonstrate the soundness or the fallacy of his represented facts and conclusions deducted therefrom.

Mr. Frost, in his own language, is responsible for the publication of the guide book that is the foundation of maximum prices allowed for trade-ins in the purchase of new automobiles. An analysis of his affidavit will clearly disclose the ability of the man in whose hands the destiny of all the dealers in the entire United States is. I say "destiny", because an abuse of this maximum price provision will cause so great a retardation of sales, as to effect a tremendous loss of profit to every dealer throughout the [fol. 268] land.

Mr. Frost spends almost four pages in an attempt to impress this Court with the fact that he is an expert in the collation of statistics relating to the automotive industry. Analysis of the affidavit seems to very effectually defeat this fact.

Mr. Frost states:

"The inability of the industry to pay fair wages and hours because of losses sustained by them through the trade-in allowances given on the sale of new cars, caused the Administrator to finally approve and present the existing Code of Fair Competition for the Motor Vehicle Retailing trade."

This is not true. The Code of Fair Competition for the Motor Vehicle Retailing Trade was presented to the President of the United States for approval because it was part of a gigantic recovery program, the primary object of which was to re-employ more people at a fair wage. As an incident to this program, the government offered as an incentive to industry in carrying the additional burden that these labor provisions entailed, certain fair trade practice provisions that sought to eliminate certain abuses in this industry. It is absolutely wrong to state that over allowances on trade-ins was the only cause for the non-payment of fair wages and hours. It is a well-known fact to any laymen walking the streets that the years 1931, 1932 and 1933 were fraught with the ravaging affects of a depression that had no precedent in the history of this country. This fact and this fact alone caused the enormous

unemployment which affected all industries, including the Motor Vehicle Retailing Industry. It is true, of course, that the sharp reduction in business created a keener competition out of which certain abuses arose, but to attribute one of those abuses as the cause for vast unemployment is a [fol. 269] superficial fallacy.

As a matter of fact, the vast abuses of labor that were so typical of other industries, such as cotton manufacturing and coal mining, never found its way into the motor Vehicle Retailing Trade. Though wages had been reduced, the average employee always received a fair and living wage throughout the entire depression in the great majority of retail dealers' establishments.

Mr. Frost discus-es practice in the past of printing and distributing of used car valuation guides. Apparently the practice in the past has been to establish fictitious values, substantially under the true value of a used automobile. These appraisals were commonly known as "shock appraisals." The object of this under valuation was to display the valuation to a prospective customer, and then with a false air of generosity, offer the prospective customer a valuation greater than that established in the guide book. Unquestionably, the theory was to deceive the prospective purchaser and lull such a purchaser into a false sense of having received an unusual value. This practice was almost universal a few years ago in the preparation of such guide books. The average purchaser of a new car soon became aware of such deceitful practice and refused to place confidence in such "shock appraisal" guide book or the unctuous false generosity of the dealer. Such purchaser totally disregarded the guide book and shopped other dealers to secure the best value in the purchase of his new car.

Even today, buyers of automobiles place no value in the official guide book and continue the practice of recent years of shopping many dealers to secure the best value obtainable.

[fol. 270] By this same token, a prospective purchaser of a new car who sought to trade in a used car, which used car was of greater value than the average price established as the maximum trade-in allowance, was never content to accept the guide book maximum trade-in allowance figure. Such prospective purchaser shopped every dealer until he found a dealer willing to offer him a true and honest value

for his trade-in, though the same might be in violation of the Code. I do not feel that in this period of stress, that such purchasers should be condemned in seeking a fair and honest value for their trade-in, though it entails a violation of the code. It is somewhat paradoxical when one honest man seeks out another and induces that other honest man to violate the law so that an honest exchange of values may be completed.

Mr. Frost states:

"The Court should note the fact that the complainant in his papers admits that he is a violator of the Code."

This is absolutely false. The complainant, through its officers, has repeatedly denied any violation of this Code up to the present time.

Mr. Frost further states:

"Nowhere in his papers does the complainant aver that under the provisions of the Code of the National Industrial Recovery Act, he has attempted to correct any of his alleged inequalities or inequities though the code has been operating as a law since October 3, 1933."

I challenge Mr. Frost to suggest any method that might have been employed by the complainant to correct any such inequalities or inequities. The complainant, through its officers, at every trade meeting and at every contact with [fol. 271] officials of the Administration, has repeatedly expressed its condemnation of the so-called "fair trade practice provisions" of this code.

Mr. Frost further states:

"The complainant herein after a period of nine months since the adoption of the Code now for the first time endeavors to assail the code and the laws under which it was enacted and after one of his violations has brought him to answer a charge in the criminal courts of this state."

This is an unfair attempt to prejudice the mind of this Court. The complainant has not stood by without expressing dissension to the code provisions but has availed itself of every opportunity to do so. The complainant is not guilty of any violation of the Code. The present proceed-

ings now pending in the Magistrate's Court are so basically unjust and without foundation in fact that it has acted as a stimulus to the prosecution of this very application by the complainant.

On February 27, 1934, the complainant addressed a telegram to Administrator Hugh S. Johnson, requesting a hearing to present to the Administrator the extreme hardship the code was inflicting upon all honest dealers, including the complainant. This telegram was sent after a public radio address by the Administrator, advising the general public at large that a hearing would be had wherein all complaints to existing codes could be voiced. In response to this telegram, a telegram was received from the National Recovery Administration reading as follows:

"Spielman, Chevrolet: This group of meetings is not to be discussion on any individual codes, though individual codes may be used as illustrations. Stop. Glad to have you appear before Group 4 on code administration and may if you so desire. Stop. Advise if you wish reservations [fol. 272] for Thursday.

National Recovery Administration, Conference Committee Room 133, Willard Hotel."

This telegram was sent at 6 P. M. February 28, 1934. The Thursday made reference to was the following day. When the telegram was received, it was absolutely impossible to arrive in Washington in time to be heard. Further, in view of the fact that the discussion was to be merely general, it was useless to expend any additional effort in a discussion of generalities. In light of this effort and all of the other efforts made on behalf of the complainant, it cannot be said that the complainant did not do everything within its power to secure some redress from the harshness of Code operation. Furthermore, on June 29, 1934, the complainant wrote to Deputy Administrator K. J. Ammerman, in charge of the administration of this Code, objecting to the high-handed method of assessments in the Code, and in such letter further stated:

"In expressing our objections, please understand that we are in full sympathy with the N. R. A. as it relates to such themes as maximum hours, minimum wages, spreading of employment and other conditions that would make the

people we employ happier as well as more prosperous, but we are definitely opposed to the regulations and market rules that actually reduce the volume of business of honest dealers. Our experience has been that the non-enforcement of these price regulations has been an ideal smoke screen for an unscrupulous dealer to work behind and eventually honest dealers must lose their patience as well as their good will and business and eventually become chiselers to preserve themselves."

Mr. Frost spends considerable time in a discussion of trade-in allowances. Mr. Frost characterizes the practice of trading-in automobiles as the vice of the industry. Apparently he little realizes that this practice has been a very substantial factor in the tremendous growth of the motor vehicle industry. If patrons had no facile method of dis- [fol. 273] posing of their old cars, there would be a tremendous handicap in the sale of new cars. Furthermore, the acceptance by a dealer of a used car affords him an opportunity to keep his service department operating at full blast restoring the used car to a condition where it is readily disposable. A further profit can be made in such disposal of the used car. In other words, while every new car dealer is for all practical purposes also engaged in the used car business, it affords such a dealer an opportunity to reap two profits, i. e., one on the sale of the new car and the second for the service rendered in re-conditioning the old used car. Therefore, the development of trade-ins should be treated as a boon to the industry, rather than the vicious vice that Mr. Frost would have the Court understand.

It is true, however, that this development of the industry has made it more complex and created more problems. Mr. Frost treats with the cost of handling used cars in the following language:

"At the time that the motor vehicle retailing code was being presented to the N. R. A., the N. R. A. made a test of over five hundred dealers' costs of handling used cars, and it was found that the average cost of these five hundred dealers amounted to 21% for handling and re-conditioning the used car."

I cannot understand the significance of these remarks. The figure 21% is cited. 21% of what? When was this

survey made? Under what circumstances? Even without this information, this survey is manifestly unfair for the following reasons: First, a survey of 500 dealers out of an aggregate exceeding 45,000 is too small a strata to draw a logical deduction. Certainly an amount slightly over 1% of an industry cannot truly portray the proper conditions. [fol. 274] Second, assuming that this survey was made sometime in the year 1933, statistics establish that only 29% of the normal sales were actually consummated during said year. The cost of handling any car is primarily determined by overhead. Basically, the overhead of a retail dealer is fixed. His rent is fixed. Most of his employees work on straight salary and with the single exception of salesmen's commissions, there is no substantial variable factor of expense. A dealer could almost as economically handle sixty cars as he could thirty. Consequently, the amount of overhead to be attributed to each car will be determined by the volume handled. In a year where the sales attain only 29% of normalcy, it is not fair to draw a conclusion based upon percentage, where so large a portion of overhead ias assessed to each unit handled.

The Code of Fair Competition for the Motor Vehicle Retailing Trade has endeavored to establish certain practices that would be preeminently fair to all dealers, yet this very Code finds it sufficient to allow 5% for such handling on cars of current series model, 10% for handling for the next two preceding models, and 15% for handling all models prior thereto. Yet despite this range of 5% to 15%, Mr. Frost would have this Court understand that the Code had fixed an absurdedly low figure, and that the general average is at 21%. As a matter of fact, in the later figures cited by Mr. Frost, he clearly establishes that the figures established in the Code are approximately correct. This definitely refutes the value of the survey made of the 500 dealers.

Mr. Frost rambles into an irrational discussion of hazards caused by the handling of used cars, in the following language:

[fol. 275] "By 1929 the used car was such a hazard through new car price alteration, that it became practically impossible to get salesmen to function in the capacity for which they were employed, namely, to go out and bring in business, to the dealers' sales room. After a salesman

would spend the necessary time in developing a prospect and making an offer on the used car, in many cases another salesman would arbitrarily make a higher offer on the used car, with the result that the new car price set by the factory and beyond the dealer's control was arbitrarily changed or reduced."

Ever since the inception of the automotive industry in 1895, there has been competition between dealers of the same make of car as well as the makers of different cars. To characterize such procedure as a hazard and to discuss the loss of a salesman's function because of such normal competitive action, is absolutely absurd. Why Mr. Frost should single out the year 1929 of all years to display that such a condition existed is beyond my comprehension. Salesmen have always functioned as the contributing influence to the closing of sales. Such effort was required whether the sale contemplated a trade-in or not. Certainly their function did not vary in the year 1929 or any other year, and frankly the year 1929 was the most prosperous year in the history of the automotive industry and certainly must have likewise redounded to the benefit of all salesmen for their splendid efforts.

Mr. Frost then states that by reason of the extreme keenness of prospective buyers and their desire for shopping for the greatest values, dealers were compelled to accept trade-ins at substantial losses. In his language the following results were attained:

"This practice became so general that by 1933, it was reliably estimated that not over 5% of the automobile dealers in the United States were solvent."

[fol. 276] This statement, made as it is by one who supervises the preparation of a guide book that establishes the prices to be paid for all trade-ins for the industry, is certainly an illuminating display of his abysmal ignorance of the entire situation. Excessive trade-in allowances never precipitated such calamitous condition in the industry. As I have explained in detail in the discussion of other affidavits, the loss of business in the automotive industry was directly attributable to the impoverishment of the great American public by this industrial depression. It would be absurd to assume that 93% of the dealers would consciously

accept trade-ins upon which they would sustain great losses to a point where they would be insolvent. Certainly, the bankruptcy records of Dun & Bradstreet would disclose a mortality of business organizations in this industry greater than perhaps any other industry throughout the nation. As a matter of fact, this industry has suffered no more than the average industry and has fared considerably better than the automobile manufacturers. I do not believe that during any period of the industrial depression, any greater proportion than perhaps 20% of the dealers were in an insolvent state. To rashly assert that 19 out of every 20 dealers were insolvent and unable to meet their constantly recurring obligations is to taint every conclusion that Mr. Frost advances with a prejudice not founded in fact.

To support his contentions, Mr. Frost asserted that the average salesman earned less than $900 per year. A salesman earns his commission irrespective of whether the dealer makes a profit or loss on his trade-in, so that an abuse of trade-in practices would never have materially reduced salesmen's income. What did reduce salesmen's in- [fol. 277] come was a drop to 29% of normalcy of all sales throughout the nation caused solely by the influences of the depression.

Mr. Frost again displays the preposterous extremes that his reasoning has attained, when he states:

"Banks refused credit to automobile dealers as such in view of the fact that the product which they sold had no established price inasmuch as the delivered price of an automobile meant nothing when any dealer who chose to do so could alter this delivered price by merely increasing the allowance on a used car."

Variation of used car allowances has been the practice in the last three decades during which period the banks of the nation have, at frequent intervals, loaned vast sums in the financing of automobile dealers. To attribute the variation of trade-in allowances as the cause for the restriction of bank loans is preposterous. The department store owner, with thousands of items on his shelves, is constantly changing and varying the price of his articles, but the banks are not indisposed to extend large loans and credits. Likewise, dealers in practically every commodity affected by the market variations have secured large loans though

the fluctuations of values may be daily. The only reason for the restriction of loans is because all banks restricted their lines in an effort to bend backward in conservatism and to remain liquid.

Mr. Frost again displays the immaturity of his childish reasoning when he states:

This naturally resulted in terriffic loss to the automobile dealers throughout the United States and a dissipation of their capital. The result was that all dealers who were not encumbered by lease which prevented them from going out of business, got out and salvaged such of their remaining capital as was possible. The balance who were unable to close their business fired every employee that they possibly [fol. 278] could, cut the wages of the remaining employees and endeavored to continue only through the sufferance of their creditors."

Mr. Frost would have the Court believe that every solvent merchant abandoned the stricken motor vehicle retail dealers' trade, leaving the "sick and disabled" to carry on at the expense of hardly pressed creditors and indulgent landlords. Are we to understand that these landlords permitted the dealers to remain without paying rent, or that the creditors stood by and demanded no satisfaction of their obligations? I call upon the normal intelligence and experience of this Court as to whether or not in their dealings with automobile dealers in recent years, such has been their personal findings. Nothing could be more absurd or further removed from the truth.

Mr. Frost cites the illustration that the dealers' franchises commanded a premium in 1929, but that the same has been completely dissipated during the years of the depression. Is this not true of the fabulous sums received for good will in the sales of most businesses during that prosperous era typified by the year 1929? Today, businesses, when sold, do not usually evalulate good will but usually base the sales price upon the current value of the investment. Mr. Frost, however, attributes this loss of value to good will to the fact that trade-in allowances varied among different dealers. Such reasoning is unsound. Mr. Frost displays a gross ignorance of the initial and primary purpose of the National Industrial Recovery Act when he states that the National Industrial Recovery Act was created

"to investigate the vices and abuses of various industries and if emergency measures were needed to create them so that codes of fair practices could be expeditely established and men be taught to conduct their business in honest fashion, so that those dependent upon the particular industry by way of labor and the dealers themselves should [fol. 279] and could create a profit and creep out of the mire of depression."

Fair trade practice provisions were an incident to the recovery program and were granted as a concession to industry to aid them to carry the burden of shorter hours and better wages. The object was not to create profits on the part of industry.

Mr. Frost devotes many pages discussing in detail the method employed in complying with the provisions of the Motor Vehicle Retailing Code relative to used car allowances. The exact provisions of the Code, Article IV, Subdivision A, provide:

"A. Used Car Allowance.

"In an effort to prevent sales below cost, heretofore due to unfair competition that has resulted in the dissipation of the large part of the capital originally in this trade and has accumulated large losses since 1926, this trade agrees to regulate itself so as to return profit possibilities and support increased wages and shortened hours.

"Giving consideration to the public interest and to prevent sales below cost, it is hereby provided:

(1) That the value of any model of used motor vehicle, either passenger or commercial, shall be the average price that the public in any given market area is then paying for such vehicle as ascertained by the Association from sworn statements of all actual retail sales to consumers, subject to the approval of the Administrator. The Association shall publish the average prices thus ascertained approximately every 60 days. In order to insure fair average value in the interest of the consumer, published averages shall be computed for the preceding period and there shall not be included in computing such average that 20% of sales which represented the lowest sales of all actual sales reported in the previous period.

(2) That no dealer shall, directly or indirectly, or by subterfuge, accept in trade any used vehicle at an allowance price of more than its value as ascertained in paragraph (1) above, less a minimum selling, handling and [fol. 280] reconditioning charge, according to the following schedule:

(a) Five percent of the allowance price as determined in paragraph (1) above, on (x) the current series model, or (y) the preceding series model;

(b) Ten percent of the allowance price as determined in paragraph (1) above on the model preceding, the two models described in paragraph (2) sub-section (a) above, namely, (x) and (y).

(c) Fifteen percent of the allowance price as determined in paragraph (1) above, on all models other than the three models described in sub-sections (a) and (b) above.

(3) To provide a record for the establishment of used car allowances in paragraph (1) above, there shall be provided in each logical trading area of the United States an Official Guide, which shall be provided by the Association which shall be known as the Association Official Guide and shall be recognized as the authority for such allowances, and which shall be based upon actual sales in each trading area for the period of approximately sixty days preceding the date on which the compilation of the official guide is started, as hereinabove provided.

(4) There shall be used as a basis of establishing allowance values, as provided in paragraph (1) and (2), above, the principle of averaging actual sales at retail to consumer for the preceding period. Since this will, in isolated instances, by reason of very few or no sales on particular models, leave a need to establish a guide figure on such models, the following method of determining the allowance values will be pursued for the public protection, namely,

(a) If any model of motor vehicle described in the Official Guide shows five or more sales at retail to consumer within the district in any period, then the average figure published becomes the maximum allowance for the ensuing period.

(b) If any model of motor vehicle has less than five sales at retail to consumer within the district for the period then the new car dealers handling this particular make car within this district shall establish its allowance value, the same to be so published in the report. These figures to be subject to approval of the Advisory State Committee and the Administrator.

(c) If any make or model of motor vehicle is not represented in the district or is no longer manufactured and less than five sales at retail to consumer are reported on each or any model of such car, then the Advisory State Committee, subject to the approval of the Administrator, will set the figure based on what like models of other makes sell for in the district."

[fol. 281] No reference is ever made distinguishing between "better grade" cars and "best grade" cars which Mr. Frost devotes so much time to.

One very basic misstatement of fact made by Mr. Frost is as follows:

"The average rate of depreciation on motor vehicles will run from 2½% per month to 3½% per month, dependent upon the price class upon which the rate is figured."

The National Automobile Chamber of Commerce, in its 1934 edition of "Automobile Facts and Figures" establishes an elaborate chart from the mass of reliable statistics submitted to it, that the average life of a motor vehicle is seven and two thirds (7⅔%) years. This is equivalent to ninety-two (92) months, or approximately a depreciation rate of 1.1% per month. The elaborate arguments advanced by Mr. Frost, based upon a theoretical rate of depreciation of 2½% to 3½% per month, is without foundation in fact and without authority.

Mr. Frost endeavors to establish that while the Code provides for an average price as the highest maximum price to be allowed prospective purchasers in the trade-in of their used cars, that such average, in fact, is not truly an average, and that the figure determined upon is in fact very close to the highest valuation in establishing the average. In order to prove his point, he states that the maximum price does not go into effect until approximately ninety days after the compilation has been secured and

completed; that a lapse of such ninety days would cause a further depreciation of approximately 10% (three months times an average of 3½% monthly depreciation. He further states that the elimination of the lowest 20% for junk sales is an elimination far in excess of the true number of junk sales. He then naively concludes that this approxi- [fol. 282] mate 10% of depreciation and an excessive elimination for junk sales advances the average figure to a point where it reflects almost the highest price value of the model reported.

Of course, this calculation is specious for many reasons. First, monthly depreciation is at the rate of 1.1% per month, and that even a ninety day period if permitted to elapse would only reflect 3.3% depreciation—truly a negligible item. Further, the elimination of the marginal 20% reported sales as junk sales, is truly a fair approximation of junk sales. The 1934 edition of the "Automobile Facts and Figures" compiled by the National Automobile Dealers' Association, the very association compiling the statistics for the dealers guide book in this industry, establishes that over 63% of used car sales are sales of automobiles over four years in age. It is readily understandable that even a greater percentage than 20% of these cars, when accepted in trade in the purchase of a new car, are completely junked and removed from circulation.

The citation of illustrations by Mr. Frost of current models to indicate that the marginal 20% would not contemplate any junk sales, is an endeavor to mislead the Court by selecting an extreme illustration and advancing such extreme illustration as the rule rather than the exception. We must, therefore, come to the conclusion that the average price of used cars as provided for in the Motor Vehicle Retailing Code is truly an average of used car sales of the respective models, and that if such is used to indicate the maximum to be allowed for trade-in, then all owners of automobiles worth more than the average, will not receive a true value for their trade-in if they seek to [fol. 283] purchase a new car. A further fallacy in the argument of Mr. Frost is that guide book values are constantly depreciating simultaneously with the true depreciation of the automobile.

The method of computation provided for by the Motor Vehicle Retailing Code does not permit in all instances

such a normal course of procedure. New values are established approximately every thirty days for the preceding sixty days. This does not, however, take into consideration the seasonal variations of the sixty day test period.

For illustration, the lowest prices for used cars are obtained in the Winter season of the year. On the other hand, the highest prices for used cars are obtained in the Spring and Summer. Nevertheless, the guide book would reflect in the Spring of the year the low averages of the Winter. By the same token, the low ebb of the late Summer would be burdened with the high averages of the Spring and early Summer. This can be proven by actual illustrations.

Illustration No. 1. In March of 1934, a 1933 Chevrolet 5-passenger Sedan was rated in the guide book at $499. Two months later, in May, the same model was rated at $523.

Illustration No. 2. In March, a 1933 Chevrolet business coupe was rated at $409. In May the same model was rated at $456. In June, this same model had advanced to $462.

Illustration No. 3. In February, a 1933 4-cylinder two door DeLuxe Sedan of Ford manufacture was rated at $358. In May this same model was rated at $385.

Illustration No. 4. In February of 1934, a 1933 8-cylinder Ford 5-passenger Sedan was rated at $497. In May of 1934 this same model was rated at $515.

These illustrations manifest a reversal of normal trends, [fol. 284] caused through the reflection of seasonal variations in succeeding periods.

What will be the result of this tendency. These illustrations refute Mr. Frost's statement that depreciation works in favor of establishing a high maximum for trade-in allowances. The illustrations cited prove that in many instances this is wrong and that seasonal trends will frequently reverse this tendency and work to the distinct disadvantage of the buyer at a time in the year when most purchasers desire to buy.

As a further illustration, the low prices obtained by dealers in the sale of used cars in February and March would serve to establish the maximum trade-in allowance price in April. Inasmuch as April is the threshhold of the Spring season, absurdly low maximums would discourage

purchasing and consequently retard business. Conversely, the higher prices secured in the sale of used cars, resulting in a high average for the months of June and July, would avail to the benefit of few buyers in August which is normally a poor month.

From these illustrations, we deduce that the seasonal variations re-act against the purchaser when the buying of new cars is greated and tend to favor the purchaser when the purchasing of new cars is lightest. In the course of time, this would serve to seriously discourage the sale of new cars.

Mr. Frost devotes almost twenty pages to a discussion and an attempted analysis of the figures and statements of the complainant. Before explaining the manifest fallacies of his conclusion, it would be wise to fully explain the necessary steps required in order to properly operate a used car department.

[fol. 285] The Spielman Motore Sales Co. Inc., complainant in this action, is the largest Chevrolet dealer, and perhaps the largest automobile dealer in the metropolitan area of the City of New York The following statement reflects the volume of used car sales handled by the complainant in the respective years 1931, 1932 and 1933:

Year	Unit sales	Amount of sales
1931	1228	$219,895.25
1932	1148	208,309.73
1933	1340	242,264.00

The operation of this used car department entails a great deal of business ingenuity and skill. There are more than 5,000 different make models and series of automobil-s presently in the hands of the public. Unless a dealer is properly qualified to handle the used car end of his business with the proper business-like planning, intelligent thinking and aggressive merchandising, the reflection of sales for such unqualified dealer is bound to seriously affect the averages reflected in the official guide book. In order that a dealer may secure a fair value in the sale of a used car, he must possess three fundamental requirements. First, ample capital. Ample capital will make available intelligent and efficient help, logical liquidation of his used cars at the proper seasons of the year and ample facilities. Second, sales outlets at stragetic points. Proper displays

of automobiles in inviting show rooms attract fair figures for used cars. Dilapidated lots and old sheds bring ridiculously low prices. Every car requires at least 125 square feet of space in which to be properly displayed. If a car is pushed into crowded quarters, the public will not pay as [fol. 286] well, and the result will be a lower general average reflected in the official guide book. A proper reconditioning of the car is essential to securing a fair price. Lack of such proper handling and conditioning means low averages. Third, capacity on the part of the dealer to supervise the used car department. A dealer must be able to buy his cars for not more than that for which he can re-sell them. He must be able to supervise the reconditioning, to see that the same is done promptly and efficiently. He must be able to prudently advertise to create a demand for his merchandise. He must be able to keep his stock in proper balance and to avoid over-stocking that will compel rapid liquidation and severe losses. He must see to it that his sales department properly treat their customers before and after the customer has purchased an automobile, for with indifferent treatment, it stands to reason that the public will pay only for what they get. Finally, it is necessary for him to see that once a man has bought an automobile that that man gets the proper service during the warranty period under which the particular car may be sold.

In conclusion, when dealers lack any of the foregoing qualifications, the result must be a lower price for their used cars and a consequent lower average for the guide book figures. This makes the prospective buyer of new cars suffer and lose some value that he is rightfully entitled to receive, because many of the dealers are lacking the three practical qualifications aforedescribed.

Another illustration of methods that cause a reduction in the average price and consequently the maximum established for used car trade-ins, is the practice of reducing the price of a used car which is sold subject to the accepting of a trade-in. If the allowance on the trade-in is [fol. 287] greater than that permitted by the guide book, the price of the automobile sold is reduced so as to bring the trade-in allowance within the provisions of the guide book. The result is a lower average for the sale. For an illustration on this point: the dealer desires to sell a particular car for $500, and the customer in this case has an

automobile to trade in the true value of which is $150. The guide book, however, permits a trade-in allowance of only $100. In order to complete this sale, the selling price of the first automobile is reduced to $450 and the trade-in allowance to $100, so as to bring it within the code. Though the car sold is worth $500, it is reported at $450, thereby reducing the general average for that particular model. This occurs quite frequently because it is the only legitimate solution to the problem presented. Both these illustrations, that of the improper sale of used cars, and the second, that of reducing the price of a used car so as to bring the trade-in within the provision of guide book, operate to reduce the average which serves as a maximum for all trade-ins of that particular model, to the detriment of the future buyer.

Mr. Frost analyzes the sales of used cars reported by the complainant, and arbitrarily concludes that these reports conclusively prove that the maximum prices reported in the official guide book were far too high if compared with the sale of used cars by the complainant.

Mr. Frost reports 317 sales by the complainant at less than the amount of the figures published in the Official Guide current with such sale. Only 87 sales by the complainant were at an amount greater than the figures published in the Official Guide current at the time.

Through an elaborate dissertation and break-down of [fol. 288] each fact, Mr. Frost continues to repeat that these reports of used car sales establish the following:

1st: Used car maximum trade in allowances are too high;

2nd: The complainant has defrauded the purchasers and afforded a lesser sum than they were truly entitled to.

Neither one of these contentions are true. The reasons are very simple. The complainant has strictly complied with every provision of this Code of Fair Competition. Most of the other dealers engaged in the metropolitan area of the City of New York have been forced through the economic necessity of sustaining themselves to violate the price provisions of the Code. The result has been that wherever a purchaser offered to trade-in an automobile worth more than the average, the complainant was compelled to express his regrets that he was unable to offer

any more than the average established by the guide book, less the handling charge of the 5%, 10% or 15% as the occasion demanded. Such prospective purchasers, in most instances, took their used cars and sought out a dealer that was not as scrupulous and induced such dealer to afford them the true value of their vehicle, though such allowance was contrary to the provisions of the Code.

For the most part, the only trade-ins that were accepted by the complainant were vehicles that were worth less than the average established in the guide book. The owners of such automobiles could receive no greater allowance because their vehicles were no more than the average.

The result of all these operations; the result of the strict compliance, has resulted in the accumulation by the complainant of a mass of cars, practically all of which were accepted in trade-in at a price less than the average which [fol. 289] represents the maximum trade-in allowance, pursuant to the guide book. The cars that were sought to be traded in worth more than the average were forced into channels of other dealers who secretly violated the code and extended to the purchaser a value greater than that permitted by the guide book, but in fact the true value of the vehicle.

This accounts for the fact that the vehicles in the possession of the complainant were for the most part less than the average established as the maximum in the guide book, and consequently, upon re-sale, in most instances a price less than the maximum established was received.

I can unqualifiedly say that if I had desired to openly and flagrantly violate the provisions of the Code, the bulk of the automobiles received in trade would have been worth, in most instances, in excess of the average established as a maximum in the guide book.

An attempt by Mr. Frost to distort these quite obvious facts into an admission on the part of the complainant that the average prices are too high, is a probable attempt to mislead this Court into the belief that the average prices are in fact not average but exceedingly high.

In light of the above described fact, it would be a useless waste of time to endeavor to answer the minute calculations of Mr. Frost. It is proper at this time, however, to point out that in all calculations, Mr. Frost has deliberately omitted to take into consideration the 5%, 10% and 15%

handling charge that must be deducted from used cars accepted in trade if based upon the average prices established as maximum by the Official Guide Book.

On page 23, the bottom of the page, Mr. Frost admits that the automobiles sold by the complainant were in fact sold at an average of $2.30 more than the maximum provided for [fol. 290] in the guide book. This taken in light of the fact that the average trade in received by the complainant were automobiles in poor condition, because owners of automobiles offered for trade-in worth more than the average had abandoned the complainant and sought out law violators who would have no compunction to accepting a trade-in in excess of the guide book maximum but at a figure that would truly represent an honest and fair value.

Mr. Frost cites three distinct illustrations to prove his point, to indicate that the elimination of the marginal 20% as junk sales, sharply increases the average. This is absolutely false. The very statistics heretofore cited indicate that more than 63% of all used cars sold are cars that are over four years of age, where the amount that is junked runs frequently far in excess of 20%. Consequently, the fact that practically no automobiles are junked in the sales of current models is counter-balanced by models four years and over. The 20% deduction permitted by the Code is a true reflection of the number of cars that are actually junked. There were more cars junked in the years 1933 and 1932 than there were new cars manufactured and sold. Certainly, under such circumstances, the proof would clearly display that the junk provision of the price regulation does not effect an increase in the average.

In the extreme illustration of the Studebaker automobile, where the code maximum is in excess of the dealer's purchase price for a new car, nothing need be said. It is an extreme illustration and is not at all typical of the operation of the maximum price regulation of the Official Guide Book. The situation cited therein is theoretical and rarely is ever consummated.

Mr. Frost, under the guise of "consumer interest" launches into fallacious argument in an attempt to establish [fol. 291] an interest in the consumer. Briefly, he states that to establish low maximum prices for trade-in used car allowances would permit dealers to acquire automobiles at low

maximum prices which they may in turn offer to used car buyers at approximately the same level. This argument is ridiculous. An automobile obtained at an extremely low price by the average dealer will not be sold by him at less than the prevailing market, which may be substantially more than the price that he has paid for it. Of course, under such circumstances, the purchaser of the new car sustains the loss which the dealer gains.

Mr. Frost, in the further devolopment of this argument, states that if excessive maximum prices are established dealers will foolishly pay high and excessive prices for used cars, and consequently they will be compelled to offer such used cars to the public at such high prices. This argument is not founded in good sense or logic. Dealers will not pay prices that run in excess of the true value of the vehicle, and consequently, under such circumstances, there is very little opportunity for over-paying the purchaser of the new car and then over-charging the buyer of the used car.

Mr. Frost, in answer to the charge made in my affidavit on the original application that the averages established by the National Automobile Dealers Association were in fact not averages but arbitrary price fixing by that Association, endeavors to explain how such an incident occurred. I have described in great detail in my original affidavit how this National Association, when it found sworn statements of used car sales to be inconsistent with what they thought was a fair price, had the same returned to the dealers throughout the country, rejecting them through the use of [fol. 292] a mimeograph letter, which stated that the reports were rejected because they were extremely low or extremely high without specific reference to any specific report.

There can be no question but that this Association endeavored to arbitrarily establish such prices as they desired and not averages as the code requires. Their excuse for their conduct is limpid and without body. Mr. Frost states:

"At the time this letter was sent, the compilation department of the N. A. D. A. was working under great stress in order to complete the first edition and place it in the hands of all dealers at midnight on November 30, 1933. The letter which was sent out was written by one of the employees

of the compilation department and after being read by officials it was seen that the lette rwas abrupt and inaccurate. We therefore immediately issued a letter expressing regret for the abruptness of this mimeograph letter and explaining why these sales reports had been returned."

It is difficult to understand how such a drastic matter of policy could have been nothing but the blunder of some unimportant clerk. Further, it is difficult to understand how hundreds of these form letters were mimeographed and despatched to dealers throughout the country without the knowledge of some one in authority. It is also difficult to understand how the National Automobile Dealers' Association employed the used car sales reports of Mr. Spielman when, after it had been returned to him, it was never again forwarded to the National Automobile Dealers' Association.

Mr. Frost frankly admits that the National Automobile Dealers Association improperly deviated from the established method in the calculation of the prices set forth in the Official Guide. Mr. Frost states:

"The right to make the test in connection with the letter referred to is obvious. The Code specifically provides for the use of sales reports over a period of sixty days previous [fol. 293] to the period of compilation, and at the same time evidence is herewith submitted showing clearly that the association used the reports covering a period of ninety days previous to the publication of the first official guide."

Mr. Frost endeavors to establish that there is no price fixing in the Motor Vehicle Retailing Trade, and that the only price fixing is that employed by the manufacturers of automobiles. As a practical matter, no prices are fixed by the manufacturers of automobiles. Factory prices are suggested and recommended. The Code of Fair Competition, however, in Article IV, Sub-Section 3, provides:

"B. Marketing Rules

The following Marketing Rules shall take effect 30 days after the approval by the President:

1. No dealer shall sell a new car at retail to a consumer for less than factory list prices, plus an amount equal to * * *"

Mr. Frost endeavors to discourage the thought that the Code and its price regulation features tend toward monopoly. One thing is certain. The method of price regulation would very seriously tend to regiment all dealers into one single straight-jacket of one arbitrary price, where the personality of service of each of the dealers would be seriously discounted. Under such circumstances, it would be a comparatively simple task for the manufacturers of automobiles to simply substitute their own agencies in place of that of the independent dealer, so that these price regulation features certainly tend toward monoplistic tendencies.

Mr. Frost takes sharp issue with me in stating that the complainant could not determine the loss of any sales as a result of his compliance with the Code. He also states:

[fol. 294] "Mr. Spielman does not submit evidence of any one of these 180 code violations. We are unable to find any record of a single violation reported by the complainant to the N. A. D. A. or to the Code Authority."

This is the rankest type of falsehood. Fifteen specific complaints of violation in the early days of the original enforcement of the Code were forwarded by Spielman to John B. Hulett, the local administrator. In addition thereto, I personally presented myself in the office of the said John B. Hulett and in great detail went over each and every one of these complaints with one Jacob Gross, the assistant to John B. Hulett. Despite all of these efforts, no progress was ever made with these reports, each and every one of which represented a lost sale. In light of my experience on these fifteen complainants, I abandoned approaching Mr. John B. Hulett, the local administrator, in full knowledge that nothing could be accomplished, regardless of how many complaints might in fact be registered. A copy of each and every one of these complaints is presently filed in the office of Mr. John B. Hulett and is specifically referred to by name and address of purchaser in the early portion of this affidavit.

Mr. Frost endeavors to characterize the assertion by the complainant of his loss of business as a mere "puff". He states:

"It is the usual alibi of the dealer or salesman when a sale is lost to a competitor to immediately say that the other dealer allowed more money. Dealers or salesmen will

never admit that they were outsold by some other dealer or salesman."

However, when one endeavors to sell a prospective customer who demands certain terms and who fails to secure such terms and returns a day or two later with a new auto- [fol. 295] mobile of the desired model, there can be no doubt in any one else's mind but that some other dealer has consummated the transactions on a more attractive basis. The vehement indignation of the complainant since the inception of the Code bears marked evidence of the tremendous burden that the Code has placed upon the complainant.

Mr. Frost again reasons like a veritable jack ass when he states with reference to my original statement that the price provisions of the Code made law violators out of honest men who seek honest values:

"We admit that it is difficult to picture an honest man asking other men to violate the law, and particularly a law that has no penalty to the buyer. Mr. Spielman, however, does not disclose how the layman not in the automobile business could accurately determine the true value of a secondhand car when 75% of the dealers themselves are unable to do so without the aid of exchange of price information."

It is absurd to think that 75% of the dealers have not a very definite idea of the used car values, particularly of the cars they deal in, as new and similar cars in the same price class. Furthermore, any layman can readily determine whether or not he is receiving a fair value for his property. The value of an automobile, particularly a popular priced automobile, is not so fraught with the mysteries of life as to prevent the average layman from having a fair conception of what his automobile is worth.

Mr. Frost, in categorical fashion, denies many of the statements contained in the supporting affidavits on behalf of the complainant, without setting forth one single fact.

In summation I frankly state that this affidavit of Mr. Frost is truly an amazing document for one who holds a position of prestige and importance in this motor Vehicle [fol. 296] Retailing Trade. The entire discourse of the affidavit is for the most part without foundation in fact or common ordinary "horse sense". In light of such fact, I urge upon this Court to disregard the contents thereof.

In conclusion, I respectfully submit to this Court that the facts as they appear in the moving papers are either undenied, principally, or have been established by such overwhelming weight of credible facts that the injunction sought for herein should be granted to the complainant.

I respectfully pray this Court of Equity to grant the complainant the relief sought for herein for this is the only forum wherein an adequate remedy against the oppression of the marketing provisions of this Code can be had.

The rights which have been urged upon this Court are fundamental rights of every citizen of this country. To deny them is to deny to those who seek them their very existence. To deny them is to remove something vital, fair and equitable in the conduct of an American business. Spielman Motor Sales Co. Inc. asserts these fundamental rights and respectfully submits that the needs of the times call for the exercise, not the sacrifice of these rights.

The right to conduct an American business in the freedom of the Democracy should be sustained by this Court at all times and the hue and cry of the bureaucrats should not deter this Court in upholding the traditions of this country and the constitutional guarantees and protection.

I respectfully submit this cause to this Court of Equity so that the Fourteenth Amendment of the Constitution of the United States shall not be a mere academic oratory subject but should be vibrant for the protection of the citizens [fol. 297] of the United States in times of stress and well as in times of prosperity.

David B. Spielman.

Sworn to before me this 28th day of August, 1934. Melvin L. Levitt, Notary Public, N. Y. Co. Clk's No. 108, Reg. No. 6L415. Commission expires March 30, 1936.

[fol. 298] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GABRIEL COHEN

STATE OF NEW YORK,
County of New York, ss:

GABRIEL COHEN, being duly sworn, deposes and says:

I reside at 450 Avenue S in the Borough of Brooklyn, City of New York, and I make this affidavit at the request of

Spielman Motor Sales Co. Inc. to set forth certain facts with respect to a transaction wherein I was involved with it in the purchase and sale of a new Chevrloet automobile.

In the month of June, 1934, I purchased a new Chevrolet sport coupe automobile from the complainant herein. As part of the consideration for the said purchase, I traded in a Willys Overland sport roadster for which I received from the Spielman Motor Sales Co. Inc., the maximum trade-in allowance provided by the Code. The car was sold to me at the regular factory list price.

About three weeks thereafter, without any solicitation, [fol. 299] one Gross, after a telephone conversation with me arranging an appointment, came down to my office. His first statement to me was that he was sent by the Motor Vehicle Code authority to investigate the sale of this new automobile to me as there had been numerous complaints lodged against the Spielman Motor Sales Co. Inc. with the Code authority. He then interrogated me as to the price I paid for the car and as to the maximum trade-in allowance which was given to me. I advised him that I secured the factory list price for the new car and the maximum trade-in allowance for the automobile trade in.

While I was relating the facts to him, he was writing them in the form of a statement which he thereafter presented to me to sign. This I refused to do as I felt there was no cause for me, a private citizen, to sign any statements or be involved in any alleged Code controversy. Upon such refusal I was admonished and warned that if I did not sign said statement I would be compelled to appear as a witness in the event that any criminal action was taken on this purchase of the car by me.

I make this statement in support of the assertions of Mr. Spielman who has advised me that almost all of the sales made by the Spielman Motor Sales Co. Inc. are being checked and investigated and that some of his customers are being harassed by investigators of Mr. Hulett.

[fol. 300] As a private citizen of this country, I think that such tactics of investigating private sales of automobiles and such espionage systems are, to say the least, detestable.

I feel that in securing the maximum Code price allowed to me by the Spielman Motor Sales Co. Inc. for my Willys Overland trade-in, while the maximum permissable price under the Code, was not the actual value of the car traded in

which was in excess of the said maximum price and worth considerably more.

As a private citizen, I cannot conceive why a governmental agency should prohibit me in securing the fair and actual value for my traded in automobile.

Gabriel Cohen.

Sworn to before me this 28 day of August, 1934. [Seal.] Melvin L. Levitt, Notary Public. N. Y. Co. Clk's No. 108, Reg. No. 61415. Commission expires March 30, 1936.

[fol. 301] Exhibit "A" to Affidavit of David B. Spielman

The New Pontiac Straight 8.

David H. Jones, Inc.

15 Valley Street, South Orange, N. J.

Phone, South Orange 2-0285—2-9664.

August 14th, 1934.

David Spielman, President,
Spielman Motor Sales Co., Inc.,
New York City.

Dear Sir:

Congratulations on your effort to rescue the automobile trade from the Frankensteins monster, which is slowly but surely draining the life blood out of the honest dealers and making fortunes for the bootlegger.

I have been opposed to the price regulating provisions of the Code since its inception and have so notified President Roosevelt, the National Association and the Newark Auto Trade Association, but my protests have made as much impression as water on a ducks back. I am inclined to believe that the trade associations are taking a purely selfish viewpoint because the code allows them to build up much stronger organizations than ever before.

Similar to your case I have taken the position that as long as the code was the law I would uphold it to the letter, believing that in a free country such a drastic law could not endure, especially after seeing one noble experiment in the prohibition law fail so utterly. Like you I have daily seen

old customers walk out of the door with a regretful look for the firm that had treated them fairly and go somewhere else to get the new car. I have even reported a couple of cases that looked like flagrant violations to the code authority, only to be told that I must also supply the name and address of the dealer who sold them the car and the price allowed, neither of which could I procure without turning [fol. 302] my automobile business into a detective agency.

Sales compared with last year for the past three months, which you know is the best selling season, average six pieces against thirty each month last year. Taking losses every month may be pleasant for some people but I have begun to wonder "what the hell I am staying in business for." Your suit offers some hope unless the Courts decision is based on a mistaken loyalty to the President and his experiments instead of on the merits of the case. I do not believe the complaint of any one dealer will get very far and offer as a suggestion that you obtain the names of every metropolitan dealer and through a circular letter invite them to become members of the "Association opposed to the price provisions of the Retail Automobile Code."

I know the factories would be pleased to see a move in this direction because it is a well known fact that the dealers are stocked to the neck with new cars and they are all running on a reduced schedule. In my own case I reached a new high of fifty six new cars on hand at one time before I called off shipments, my average on hand last year being from six to ten cars.

I am rather inclined to think the public would also approve such a move and the dealers who started it, as a large majority of them will keep on running the old car rather than violate the law themselves. I have a number — such customers and the only tough thing is that they will not spend a penny except on absolutely necessary maintenance, knowing that when the fateful time comes to trade in their car, some dealer will give them as much for it as the top code figure despite its shabby condition.

As an alternative to the present code I would suggest that the dealer body, while in the saddle, force a closed territory provision on factories, guaranteeing each dealer kept, sufficient population and territory to operate his business, and keep the N. R. A. code book only as a guide to show the poor or unscrupulous dealer exactly how much

licking he is going to take before he takes the plunge. With this system he would either go out of business or reform and in either event he would not be the menace to other dealers that he is now.

The present system must be changed, the only alternative in prospect being to retire from business and leave the field to the gyps or else reduce the entire force to a skeleton organization and wait for the National Association and the Administration to realize the hardship they are imposing on honest dealers in territories where there are plenty of the other kind.

[fol. 303] I hope we don't have to wait as long as we did during Prohibition. In closing I wish to thank you for making this test case and express a hope for its success.

Yours very truly, David H. Jones.

[fol. 304] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JOHN B. HULETT

STATE OF NEW YORK,
County of New York, ss:

John B. Hulett, being duly sworn, deposes and says:

That in this affidavit I am replying to the statements made in the affidavit of David B. Spielman verified the 28th day of August, 1934, submitted in reply to the defendant's affidavit herein in opposition to the motion made for a preliminary injunction to restrain the defendant from prosecuting the violation of the Code of Fair Competition for the Motor Vehicle Retailing Trade under the Schackno Act of the State of New York.

I call the Court's attention to the fact that in the said Spielman's replying affidavit a personal attack is made against all the affiants who submitted affidavits in opposition to the said motion to restrain. Such attack is not based upon actual facts but upon generalities and arguments unsubstantiated by actual fact. A reading of the affidavit will show the scurrilous appel-ations applied by the said Spielman against said affiants.

[fol. 305] I shall, however, attempt where necessary to concisely answer the said Spielman.

I shall hereafter mention by page number the pages of Spielman's affidavit without referring to the said affidavit in the future, so as to save repetition.

On pages from 1 to 6, both inclusive, an attempt is made to convince this Court that there are others in the industry who take the same position as the said Spielman with respect to the marketing rules of the Automobile Retail Code. No affidavits are submitted by any other affiants.

Reprints are made of alleged letters received by the Automotive Daily News from one R. H. Long, of Farmingham, Massachusetts, and by one M. H. Bury, of Philadelphia. Nothing in these reprints says anything with regard to the constitutionality of the Schackno Act or the said Code. An examination of the Automotive Daily News will show these letters, as well as other letters, were received by them by an invitation to the said dealers to express their opinions with respect to the operation of the trade provisions of the said Code. Mr. Spielman does not place before this Court those letters of dealers who are in favor of these provisions. Your affiant does not deem these two letters of sufficient value to call for the necessity of reprinting the letters of those who are in favor of the Code. These letters in Spielman's affidavit show the personal opinions of certain dealers.

[fol. 306] It is interesting to note that in Mr. Bury's letter he desires, in his fifth paragraph on the fourth page, a solution of the problems of the dealers by way of enforcement of the Code.

The letter mentioned on page 6 from David H. Jones, Incorporated, is a mere expression of opinion from a dealer. Apparently, this particular dealer, Jones, is not doing as good business as some of the other dealers in the metropolitan area, but it is interesting to note that in a letter signed by this same David Jones to Mr. Horace A. Bonnell, Code Administrator of New Jersey, 25 Branford Place, Newark, New Jersey, this letter written three days after Spielman's Exhibit A letter, he states in part as follows:

"In New York City recently a dealer was fined heavily and his name given wide publicity. Unless something like this is done here and soon it will be too late for the honest

dealers who are being driven out of business while what business there is goes to the gyps.

"We think it is up to you to justfy your position as Administrator by showing up some of the violators and giving them the publicity their conduct deserves."

Mr. Spielman's statement on page 6 that these three letters are sufficiently clear in themselves to sustain his position is an absurdity. The letters in themselves merely express personal opinions out of more than thirty thousand dealers, and even out of these three, at least two, in the last analysis desire strict enforcement of the existing Code.

In my twenty-five years of experience, in this industry, I found it difficult to exceed a net profit of 2% on my gross sales annually. I have found this to be the usual percentage of net profit made by other dealers, in normal times.

[fol. 307] In the face of this recognized situation, Spielman's statement that the complainant herein has lost in 1934, which is certainty not a normal year, one hundred thousand dollars in sales should focus light on the fact that at best, were Spielman's facts correctly stated, the complainant would lose at the most about two thousand dollars profits. Therefore, even if we assume that the broad and unsupported claim on the part of Spielman that he sustained a loss of one hundred thousand dollars in sales is correct, the actual dollars and cents loss which approximates $2,000.00 is hardly sufficient to warrant his extravagant charges that his business is being ruined and that he is being deprived of precious constitutional privileges. No tangible, definite or detailed evidence has been submitted to prove the truth of these statements made by Spielman.

The question as to the fairness of the average price allowance as provided for in the Code is taken up by the affidavits of Mr. Jack Frost, to which I respectfully direct this Court.

On Page 7, Spielman states that the complainant will be deprived of its property without due process of law because of the penalties provided in the Schackno Act, and then, in parentheses he states "$500.00 per day for each alleged violation." The amount of the fine in each instance of a violation is determined in any amount up to $500.00 by the trial Justice after conviction. The fine is not a con-

tinuing fine since a violation of the marketing rules of the Code is just a specific instance of a violation and is not a continuing violation. This effort to mislead the Court is present throughout Spielman's replying affidavit.

On Page 9, Spielman attempts to deny that the complainant admitted violating the price regulations of the Code. [fol. 308] To settle the point, I am setting forth in full, not in part as Spielman did, the "Twenty-First" paragraph of the complainant's complaint, which speaks for itself:

"Twenty-first: That by allowing customers and patrons of the complainant, actual, fair and honest values for used car trade-ins on the purchase of new automobiles, such prices being higher or lower than the 'average' purportedly fixed in the said official Guide, complainant after duly complying with all other provisions of the Motor Vehicle Retailing Code, makes a fair return and profit on its investment."

On pages 10 and 11, Spielman attempts to state that there are threats of prosecution on the part of the defendant against the complainant. There is no threat of a prosecution; the prosecution is presently pending. I deny the making of any threats.

The statement contained in Spielman's affidavit that it is immaterial whether the prosecution is based on discount or trade-in allowance as the price fixing result is the same is incorrect. The sales price of a new automobile is set by the factory which manufactures and sells the car to the dealer. The fact that a dealer may not sell a new car for less than list price as stated in the Code is a condition that the industry has always been more or less subject to in view of the fact that the franchise of the dealer usually depended upon his respecting the prices set by the manufacturer. The allowance made by the dealer for the used car traded in is usually the deciding factor in his profit or loss in the transaction.

Since the prosecution pending is one in which the complainant is charged with having sold a car at a discount. I have in my first affidavit submitted herein pointed out to the Court the fact that the used car provision of the Code is improperly before the Court. The new thought on page [fol. 309] 11, which does not appear on any of the original papers submitted in this proceeding is that there are now

pending threats of prosecution by me for sales involving trade-ins. No threats have ever been made by me or by my office against the said complainant that prosecutions will be instituted against it on sales made by it involving trade-ins. It may be that thereare other complaints against the complainant which involve trade-ins, but as I stated in my original answering affidavit, it is not my intention to institute any examinations or prosecutions against the complainant until its rights have been adjudicated in the present proceeding pending the Magistrate's court.

On pages 11 and 12, Spielman does not deny the truth of my statement in the first affidavit that the complainant opened two new branches of his business since January 1st, 1934, which may account for a great part of the increase in the complainant's payroll, as alleged by him.

I deny the statement set forth on pages 13, 14 and 15 with respect to the labor complaint that was lodged in my office. At no time did I urge upon Mr. Spielman to sign a legal document, if he desired "to avoid trouble". On the contrary, every opportunity was given Mr. Spielman, who raised a question as to the interpretation of the Code, to take the matter up with his counsel. In fact, in a letter subsequently received from the complainent, they called my attention to a question of the interpretation of the Code as to its labor provisions: whether or not they were violating the Code.

I do not, however, desire to take up the Court's time with something that is foreign to the issues involved herein. [fol. 310] The fact remains that the said letter of the complainant raising the question of the interpretation of the Code is in my possession.

I call the Court's attention to the general statements made on page 15 with regard to Spielman's attempt to convince the Court that he spoke at every trade meeting denouncing the provisions of the Code of Fair Competition; also the fact that no corroborating affidavits are submitted by him to substantiate this alleged fact.

I deny the statements made on pages 15, 16, and 17 to the effect that Spielman had considerable difficulty in securing from me the first Official Used Car Guide Book, listing used car prices. I had no books to distribute until one day prior to December 1st, 1933. As a matter of fact, I received one letter from the complainant dated December 1st, 1933, ask-

ing for the book. He receipted for two copies of the Guide Book on December 1st, 1933, which receipt is in my possession. Since the complainant received these books on the same day, his difficulty in securing the Guide Book seems to be exaggerated.

I deny the statements on pages 17 and 18 to the effect that the complainant and the Bushwick Decatur Motors, Inc. have been victimized. As a matter of fact, I have in my possession an admission of the violations charged, signed by an officer of the Bushwick Decatur Motors, Inc. This matter is now in the process of adjustment.

The Court will please note that on pages 18, 19, and 20, where reference is made up to a number of complaints made by the said complainant against other alleged violators, [fol. 311] only ten complainants are actually mentioned, although the complainant and Spielman have stated that they lost one hundred and seventy to one hundred and eighty sales because other dealers violated the Code and were therefore, successful in consummating the sales.

I respectfully call to the Court's attention the fact that affidavits of the purchasers mentioned on said list are not affixed to said affidavit.

I desire to apprise this Court of the following facts with regard to the list of complaints set forth in Spielman's affidavit:

With respect to the alleged complaint of Mr. Shore of the Gold Seal Button Works, 416 Marcy Avenue, Brooklyn, New York, who, it is alleged, purchased a car from the Bates Chevorolet Company in violation of the Code, I have no record of any such case being sent me.

With respect to H. Sternberg, we have a record of the purchaser's name given us by complainant as Harry Sternberg, 4403 Avenue I, Brooklyn, New York. Our investigation showed that this address is the residence of one, Louis Sternberg, who was interviewed. He stated he had no brother by the name of Harry, but that he did have a brother by the name of George. He refused to give either the business or residence address of the latter. He promised to have his brother stop in at our office. His brother never called to see us. We communicated with the alleged dealer who sold the car, the Prince Motors. We were, however, unable to get any information from Prince Motors, other than the fact that they sold a car to one Jerry Stern-

berg of 2207 19th Street, Brooklyn, New York. Our investigators called at 2207 19th Street, but could find no such address. We have no definite evidence of a violation. Our Inevstigating department is still endeavoring to trace this matter.

[fol. 312] With respect to the Metro Woolen Company, 7 Washington Place, New York, no dealer was mentioned to us. A report was shown and read by Mr. J. Gross of my office to Mr. Spielman personally which gave the history of the investigation. There is a possible violation here of a $6.00 over-allowance. This matter is receiving attention.

With respect to H. Q. Seidner, 401 Broadway, New York City, dealer, Brownsville Chevrolet Company, Spielman claimed the purchaser traded in a Willys-Knight for which he received an excessive allowance. Our investigation does not show this. Mr. Seidman, the purchaser, who is an attorney, wrote a letter stating that the Brownsville Chevrolet Motor Company had not violated the Code, but did state that Mr. Irving Spielman of the Spielman Motor Sales Co. Inc. agreed to give him a radio amounting in value to the sum of $59.59, free of charge if he would come back in two months.

With respect to "purchaser, Mr. Weinstein of the Dominion Dyeing Co., 83 Crosby Street, New York City, dealer, Bates Chevrolet," an investigation has been made and reveals no violation against the Bates Chevrolet Company.

With respect to M. Ladzin of 208 Bedford Avenue, Brooklyn, New York, an investigation has been made and no violation found.

With respect to I. Abramowitz, Stanto- —, New York City, purchaser—he claims he bought his — the Beacon Motors. He favored this concern because — -chased rugs from him.

With respect to Hamper & Co., Inc ., — New York City, I have no record of any such case — me.

[fol. 313] With respect to B. Rubner, 2101 Westb-, Brooklyn, the statement of facts given me by Spielman — -accurate and incomplete, no dealer being mentioned by — Spielman. This matter is in the hands of the investigator — further investigation.

With respect to Sidney Topel of 1635 Atlantic Avenue, Brooklyn, New York, dealer, Brownsville Chevrolet Co. an investigation has been made and no violation found.

I do not believe that Spielman can conscientiously urge that all these alleged sales which he claims were lost by complainant were lost because of any of the provisions of the Code.

I deny the statement that no action was taken by me or my office to investigate and determine whether or not violations were committed in the aforementioned cases.

According to Spielman, he reported only ten of the 170 to 180 cases in which he alleges he lost sales on account of violations by other Dealers.

I deny the insinuations made on page 21, that approximately one thousand dealers violated the Code. I refer the Court to my original affidavit with respect to this matter.

I deny the allegations set forth on pages 21, 22 and 23, that I have been administering the retail Motor Vehicle Code with the "administration of executive, judicial and legislative power much akin to that of a sovereign power"; that every means that could be devised of "human ingenuity was used to cud- members into this Association"; that I tried to "build up a but-cratic device that would perpetuate the officers of the Association in their respective positions, availing them of substantial income for their efforts." I have, on the other hand, tried to carry out the instructions of the State Advisory Committee.

[fol. 314] To the date of the making of this affidavit, nineteen violators have been held in the Magistrate's Court, and of them four have been tried and convicted in the Special Sessions Court for violations of the Code. It is not true that all of the others of the one hundred and twenty-five proven violations have been adjudicated or adjusted by me. Some have been adjusted and some are with the State Compliance Board of 45 Broadway, New York City, for approval to proceed with prosecution, and others are being prepared to be sent to 45 Broadway, for that office's consent to proceed with prosecution. Some few fines have been paid.

I deny the statement that the sums of money paid as fines amount to vast proportions and that this money has found its way into the "coffers of the Association subject to the use of its officers".

Apparently, said Spielman does not understand, or is not familiar with the rules governing the Code Authority.

A manual has been prepared by the National Recovery Administration, setting forth the procedure to which every Code Authority must adhere.

In accordance with the procedure outlined in this manual, conferences were had with the said complainant through its officer, Spielman, pursuant to a letter written by me to him concerning the complaint lodged.

I affix hereto an affidavit of Irene Keenan, my secretary, who denies the statements on page 23 to the effect that Spielman Motor Sales Co. Inc. was "in very serious trouble".

I deny the statements on page 23 that I advised Spielman that a "very serious violation had occurred", and that [fol. 315] unless the complainant signed an agreement to be bound by the findings of the Committee, a criminal prosecution would be commenced.

I have never threatened any of the dealers of the industry in their conferences with me to coerce them into a settlement. I have advised them of their rights in each instance, and reported to them the complaint submitted to me, and asked them to state their position.

Spielman's own statements on pages 23 and 24 confirm the fact that every opportunity was given the respondent, since he himself states that I suggested Spielman take a few days to investigate the matter.

I deny the statements set forth on page 24 to the effect that I had endeavored to entrap one of the complainant's employees and had "framed" one of his salesmen.

I keep minutes of these conferences and if the Court desires, I am prepared to submit the same to this Court. But at this time I desire to save the space necessary for reprinting since I do not think they are pertinent to the issue.

The conclusion reached by Spielman on page 24, that "this Association and its Commissioner has been using the Code and the N. R. A. as a vehicle for the advancement of their own pecuniary benefit" naturally fails in proven fact, and I deny this statement.

My finding that a violation has been committed does not of itself constitute me a judge and jury as to the facts, since if it must be approved by the State Compliance Board [fol. 316] the matter is then brought to the Courts for deter-

mination, which make the adjudication of guilt or innocence, and not I.

It is interesting to the Court to note that the Association to which Spielman refers has in the metropolitan area about nine hundred members, constituting a large majority of the Dealers in this Code District.

I deny the statements as alleged by the said Spielman on page 24 and 25 to the effect that I was proceeding improperly as Commissioner for the State Advisory Committee.

I herewith set forth in full a copy of a letter dated April 26th, 1934, sent to Theodore Southworth, Chairman of our State Advisory Committee, by the National Recovery Administration of 45 Broadway, New York City, as well as a copy of a letter forwarded to me, dated April 26th, 1934:

National Recovery Administration

45 Broadway, N. Y.

April 26th, 1934.

Mr. Theodore Southworth,
250 West 5th Street,
New York City.

DEAR MR. SOUTHWORTH:

Confirming the understanding reached at the meeting last Monday, I wish to inform you that the State Committee of the Motor Vehicle Retail Trade is authorized to handle Trade Practice complaints in the first instance. I have had this authorization confirmed in Washington. It is not authorized, however, to handle Labor Complaints except on reference from this office, when such reference is made by the Labor Compliance Office.

Very truly yours, (Signed) Robert K. Straus, Special Assistant to General Johnson.

RKS:hb.

[fol. 317] National Recovery Administration

Office of State Director, National Emergency Council
45 Broadway, New York City

Mr. J. B. Hulett, April 26, 1934.
Motor Vehicle Retailing Code Authority,
250 West 37th Street, New York.

DEAR MR. HULETT:

In accordance with the conversation between Mr. Robert Straus, yourself, and myself, held in this office today, it is

felt that the payment by the Respondent to the Complainant of a sum equal to the profit which the Complainant would have received if he had not lost the business to the Respondent, would be a very fair method of adjustment of all trade practice complainant wherein one dealer succeeded in depriving another of business through violation of the Code.

We do not feel however, that any charge should be made to cover the costs of the development or procedure of the case by the Code Authority, or its agents.

Very truly yours, (Signed) Lammot Du P. Copeland, Acting Trade Practice Compliance Director.

C:MS.

These two letters were the culmination of the question raised in the National Recovery Administration's Office as to whether my procedure was proper.

I deny most emphatically the statement on page 25 that I have made a deliberate attempt to mislead this Court by my statement in my original affidavit to the effect that I was not the moving factor in arranging the pending action against the complainant by the defendant. The fact is that this was brought about through the local Brooklyn Association of which the said complainant is a member. The procedure adopted by me when I first interviewed complainant was in pursuance of the said manual of the National Recovery Administration.

[fol. 318] I deny the statements set forth on page 25 to the effect that more than one hundred retail dealers have frankly expressed their thoughts that the price regulatory provisions of the Code are unworkable. The statement in itself is general and the names of these dealers are not mentioned, which makes the statement inconsequential.

I further state that at no time have I been apprised that any of the dealers have stated that they were in fear of what might happen to them if my alleged wrath as Commissioner were incurred against them. This is only another extravagant statement unsubstantiated by any facts.

I deny the statements set forth on pages 26 and 27 to the effect through insinuation that seven hundred and fifty dealers were approached for affidavits and only fifty-seven gave their affidavits. As a matter of fact all the affidavits were procured, only on the 14th and 15th days of August, 1934, in a period of twenty-four hours. The men who procured the affidavits are the following:—George E. Porter, H. V. Flan-

nery, John G. Gross, Gerald Foley, L. Wessels. Their method of obtaining these affidavits is set forth in their affidavits annexed hereto and made part hereof. The Court can well see that it would have been a physical impossibility for these men, working in pairs, to have covered seven hundred and fifty dealers in the local metropolitan area in said period of time.

The general conclusion reached by Spielman on page 26 that these fifty-seven affidavits were executed in alleged fear of the Commissioner, and that these affidavits contain rank falsehoods only again shows the reckless manner in which the complainant makes statements.

[fol. 319] An examination of the date of the verification of the various affidavits will prove the facts stated by me as to when these affidavits were procured.

I wish to point out to the Court at this time that when a statement is made by me, I am able to procure substantiating affidavits because of the truth of the statements therein contained.

I deny the statements contained on pages 26 and 27 to the effect that a special investigator, name unmentioned, was sought by me to be used for the express and sole purpose of tracing down every one of the complainant's contracts and that this unnamed investigator refused employment. As a matter of fact, I made no such statements to any of my investigators, or to anyone that sought employment with me as an investigator.

I deny the statements on page 27 with regard to the alleged purchaser, Gabriel Cohen, who was interrogated by two of my investigators, John Gross and Borror. The affidavit of John Gross annexed hereto and made part hereof is in denial of the statements made with reference thereto.

I deny the allegations as stated on page 28 and state that all investigations made by me are made in pursuance of the enforcement program of the N. R. A., which includes the protection of the public.

Although this is irrelevant to the issue involved, I wish to call the court's attention to the fact that in January of 1934, a majority of the Chevrolet dealers in this Code district requested that they be permitted to use a handling charge of $28.50 in computing the delivered prices of Chevrolet automobiles in this Code District, in accordance with [fol. 320] Paragraph 1, Subsection B, Article IV, of the

Code of Fair Competition for the Motor Vehicle Retailing Trade, which charge I approved.

Subsequently, the Chevrolet dealers presented a petition signed by a majority of them to reduce this handling charge, which reduction I accordingly approved.

Since all this took place at the instance of the dealers themselves, and since I have no power to arbitrarily fix any handling charges, the Court will see that the statements made by the said Spielman are ill-founded in truth and fact.

I call the Court's attention to the replying affidavit of Ralph Ebbert, annexed hereto and made part hereof, which affidavit responds to the allegations set forth on pages 29 to 32 inclusive and part of 33.

With respect to the statements on pages 33 to 41 inclusive, referring to the affidavit of Hiram Bates Pope, I might say that an examination of the said affidavit and the reply made thereto by the said Spielman merely shows that Spielman again expresses his personal opinion of what Mr. Pope set forth in his affidavit, and some more unfounded deductions.

It is interesting to note the following statements which appear on page 38:

"• • • While it is true that the improvement from the year 1933 to 1934 was exceptional, the industry, by no means has returned to normalcy."

The foregoing statement is just another illustration of the inconsistency of Spielman's statements. While in other parts of his affidavits, he complains bitterly that the industry [fol. 321] cannot survive with the Code in operation, here he admits that there is an improvement in business in the year 1934; and this, notwithstanding the fact that the very Code which he objects to is in operation.

Spielman concludes on pages 42 to 48 inclusive, in reply to the affidavit of Mr. Oscar A. Pearson, that Mr. Pearson had created a wrong impression. I fail to find any letter or affidavit by the said Mr. Pearson annexed to Spielman's papers to show any error made by him, or to correct what he has heretofore averred.

With respect to Spielman's statements appearing on pages 46, 47, 48 and 53, concerning statements allegedly made by Alvin McCauley, president of the Packard Motor Company, I wish to state: that in the past there has been a tendency for Dealers in the high priced automobiles to al-

low more for a given used car than could be allowed on the purchase of a cheap car, and in some cases, the list prices of new cars have been kept up by the Manufacturers to provide a greater margin of profit to cover these larger allowances. On this account, with the advent of controlled used car allowance prices, some manufacturers found it difficult to sell their product without over-trading, and, accordingly, found it necessary to reduce their list prices. To use the case in question for example,—Packard list prices were reduced on June 21st, 1934, in amounts ranging from about $380.00 to about $1200.00 per car. This tendency to price new automobiles in accordance with their real value is, of course, beneficial to the buying public.

I further wish to state that the complainant deals in the sale of new Chevrolet cars. Since the Chevrolet car is a low priced car, his reference to high priced cars is foreign to the issue involved in this matter.

[fol. 322] I deny the statements set forth on page 48 that the increase of new car sales in June and July, 1934, has been caused by the alleged flagrant violations of the Code. There is no evidence submitted substantiating this general statement, as well as the other statements following on the same page.

With reference to the statements made in reply to the affidavit of Harold H. Straus, my affidavit hereinabove has dwelt on Spielman's allegations of arbitrary fixation of prices for the sale of new cars, and has covered the situation as to whether I threatened action against the complainant on other violations.

In connection with the statements made in reply to the affidavits of the fifty-seven dealers at pages 50 to 61 inclusive, the Court will please note the fact that these fifty-seven affidavits were all procured within twenty-four hours, as heretofore explained, which fact speaks for itself.

I doubt that Spielman spoke to more than one hundred dealers and that all with but one exception condemned the operation of the Code (Page 51 of his affidavit).

I deny that any inducement was given by me, or my office, to have the aforesaid affidavits signed by the various affiants.

I respectfully call the Court's attention to the affidavit of J. E. Kopel, as well as the affidavit of Stephen Bayers of the Bayers' Chevrolet, whose names are mentioned on

page 51, which affidavits are annexed hereto and made part hereof.

The statements on pages 52 and 53 with regard to the used car dealers are not sound. There is no question that the used car dealers have benefited by the stabilization of used car prices. Formerly, their business was a "hit and [fol. 323] miss" business. Now, the market values of used cars are available to them.

With regard to procuring affiants as stated on page 54, the method of doing so is explained by the investigators hereinbefore mentioned, whose affidavits are submitted herewith, and made a part hereof.

With respect to the Ford dealer mentioned on page 54, and the statements therein contained, it is interesting that the name of this dealer is not mentioned, nor is there an affidavit attached to substantiate the statements made.

The analysis by Spielman of the contents of the fifty-seven affidavits as set forth on pages, 55, 56 and 57, constitutes Spielman's opinion.

In further response to the statements contained on pages 57, 58, 59, etc., I have received certain resolutions passed by Union Auto Trade Association and New Jersey Automotive Trade Association, annexed hereto and made part hereof, marked Exhibits "A" and "B" which show, contrary to the opinion of the said Spielman, that the majority of those engaged in the industry in New Jersey are in favor of the Code and the used car Guide Book.

It is interesting to note that notwithstanding all the arguments of the said Spielman, he admits that "there can be no question but that adherence to the President's Recovery program would have occasioned an increase of employment and the reduction of the hours of each employee". This statement clearly points out the inconsistency of the said Spielman.

The statement on page 59 that if the Code were enforced [fol. 324] the dealer would make a "high exorbitant profit by complying with the Code, merely proves even to the understanding of the said Spielman that the Code is for the benefit of the dealers. But realizing that this admission would be harmful to him, he terms the profit "high" "exorbitant" without submitting any facts or figures in support of such contention.

It is interesting to note how thoroughly familiar Spielman seems to be with the methods that may be employed by

dealers who conspire to violate the Code, as set forth on page 60.

I deny, as stated on page 60 that:

"non-compliance is prevalent and there is hardly a dealer that has not in some instances allowed discounts or trade-in allowance in excess of Code provisions."

I further definitely deny that violation is more common than compliance.

In conclusion, I aver that the statements contained in the complaint, affidavits in support of the complainant's motion, and the replying affidavits submitted by the complainant, furnish factually no evidence of probative value to sustain the application of the complainant for a preliminary injunction, or for the relief prayed for in the complaint, and I, therefore respectfully renew my prayer for a denial of the said application for a preliminary injunction, and ask for a dismissal of the complaint.

JOHN S. HULETT.

Sworn to before me this 8 day of September, 1934. G. L. Schultgendorf, Notary Public.

[fol. 325] EXHIBIT "A" TO AFFIDAVIT

Union Auto Trade Association
119 East 5th Street
Plainfield, N. J.

Telephone 6-4755

Resolution Adopted by the Union Auto Trade Association at the Last Regular Meeting, Held Aug. 13th, 1934, at Elizabeth, N. J.

Whereas: The vast majority of the members of the Union Auto Trade Association, an association of 73 new car dealers, have individually gone on record as being definitely in favor of the Motor Vehicle Retailing Code and the used car Code Book as a means for creating better business conditions and practices in the Automobile Retailing Industry and,

Whereas: The evidence as indicated by the small number of reported violations and subsequent investigations in the trade area served by the Union Auto Trade Associa-

tion shows excellent dealer compliance, and in most instances investigation has proven that violation was not willful, but purely technical, and,

Whereas: Report by member dealers of the Union Auto Trade Association indicate that, on the whole, customers are receiving better allowances on used cars and dealers are receiving more equitable sale prices that they did prior to the adoption of the code,

Therefore, Be it Resolved, that the statements appearing in the issues of August 3, 1934 of the New York Herald Tribune and the New York Times, reported to have been made by David Spielman, President of the Spielman Motor Sales Company, Inc., of New York are erroneous and misleading in so far as the dealers of Union and Somerset Counties are concerned and are in conflict with the best interests of the Automotive Dealers and the National Recovery Program. The specific statements referred to are those to the effect that:

1. "* * * more than 90% of all dealers are openly and flagrantly violating the code."

2. "* * * the maximum prices (as listed in the Code book) deny prospective purchasers an honest and true value for used car trade-ins."

Union Auto Trade Association,
Halsey S. Mills,
Secretary.

Sworn and subscribed before me this 5th day of September, 1934, as being a true copy.

Clara L. Archbald, Notary Public of New Jersey. My commission expires Jan. 7, 1936.

[fol. 326] EXHIBIT "B" TO AFFIDAVIT

New Jersey Automotive Trade Association

421 Cleveland Avenue,
Plainfield, N. J.

Phone, Plainfield 6-1200

Resolution Adopted by the New Jersey Automotive Trade Association at the Last Regular Meeting Held August 15, 1934, at Trenton, New Jersey.

Whereas: The vast majority of the members of the New Jersey Automotive Trade Association have individually gone on record as being definitely in favor of the Motor Vehicle Retailing Code and the used car in the Automotive Retailing Industry and,

Whereas: The evidence as indicated by the small number of reported violations and subsequent investigations throughout the State shows excellent dealer compliance, and in most instances investigation has proven that violation was not willful, but purely technical, and

Whereas: Report by member dealers of the New Jersey Automotive Trade Association indicate that, on the whole, customers are receiving better allowances on used cars and dealers are receiving more equitable sale prices than they did prior to the adoption of the code,

Therefore: Be It Resolved, that the statements appearing in the issues of August 3, 1934 of the New York Herald Tribune and the New York Times, reported to have been made by David Spielman, President of the Spielman Motor Sales Company, Inc., of New York are erroneous and misleading in so far as the dealers of New Jersey are concerned and are in conflict with the best interests of the Automotive Dealers and the National Recovery Program. The specific statements referred to are those to the effect that:

1. "• • • more than 90% of all dealers are openly and flagrantly violating the code".

2. ". . . .the maximum prices (as listed in the code book) deny prospective purchasers an honest and true value for used car trade-ins."

W. J. Regan, President.

Sworn and subscribed before me this 5th day of September, 1934 as being a true copy.

Clara L. Archbald, Notary Public of New Jersey. My commission expires Jan. 7, 1936.

[fol. 327] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF RALPH EBBERT

STATE OF NEW YORK,
County of New York, ss:

Ralp Ebbert, being duly sworn, deposes and says:

That I am the manager of the Brooklyn Motor Vehicle Dealers Association, as well as the Brooklyn & Long Island Automobile Dealers Association.

That I have read the replying affidavit of David B. Spielman to the affidavit which I submitted in opposition to the motion for a preliminary injunction against the defendant in the above entitled matter, which was verified by me on the 15th day of August, 1934.

That I am submitting this affidavit in reply to the said Spielman's affidavit and in support of my original August 15th affidavit submitted herein.

This Court should ignore the insinuations made by the said Spielman in his said affidavit on page 29, that my personal sentiments were contrary to the facts stated in my [fol. 328] said affidavit of August 15, 1934.

I deny the said Spielman's statements therein and affirm that our two associations, of which I am manager, are separate and independent organizations and are not ruled and dictated by Mr. J. B. Hulett.

Mr. Spielman has confused the meeting mentioned in my affidavit of August 10th at the Hotel St. George with another meeting at the Hotel St. George held on October 18, 1933, at which time pledges of compliance and endorsement of the Code of Fair Competition for the Motor Vehicle Retailing Trade were distributed.

This October 18th, 1933, meeting was not held by our association but was called at the instance of Theodore Southworth, as chairman of the Metropolitan State Advisory Committee.

At the August meeting preliminary codes were presented to the meeting but no pledges were distributed to the members for signature since the code had not been put into effect. The Code was approved by the President on October 3, 1933.

From a reading of Mr. Spielman's statements on page 30 of his affidavit, the fact is proven that he did not take the floor in the meetings mentioned in my affidavit of August 15th, 1933, prior to the adoption of the Code to state his views thereon. He states that "although frankly I did not endeavor to secure the floor."

[fol. 329] I therefore reaffirm what I stated in my affidavit of August 15, 1934, all to the effect that prior to the adoption of the Code the said Spielman and/or the complainant did not take any recognized positions at the meetings mentioned, and certainly made no protest to the proposed codes.

I deny that in any conversations that I have had with Mr. Spielman have I said there was considerable merit to Mr. Spielman's position in this litigation.

Ralph Ebbert.

Sworn to before me this 6th day of September, 1934.
Jerome H. Brill, Notary Public.

[fol. 330] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF EZIEL KOEPEL

STATE OF NEW YORK,
County of New York, ss:

Eziel Koepel, being duly sworn deposes and says:

I am President of E. Koepel Inc., Chrysler and Plymouth automobile dealers located at 162-19 Hillside Avenue, Jamaica, Long Island.

I have read that part of the reply affidavit of David B. Spielman verified August 28, 1934 which refers to a conversation he had with me and allege statements that I made to him, more specifically contained on Page 51 of said Spielman's reply affidavit.

I emphatically deny that I made any of the statements Spielman alleges I made.

What actually did occur was as follows:

The said Spielman called at my place of business a month ago and showed me an affidavit which he wanted me to sign.

Since the affidavit condemned the Code, I refused to sign it. I told him that my business had benefited greatly by operation of the Code; that under the Code the dealer was able to conduct his business at a profit; that by virtue of the salutory provisions of the Code, for the first time in the twelve years I have been in business as an automobile dealer, I have been able to make profits on many used cars which I had taken as trade-ins upon the purchase of new [fol. 331] automobiles and in the case of the remaining automobiles which I took as trade-ins since the Code went into effect I suffered no loss; that the benefits accruing the dealer under the Code were many and the only salvation of the dealers was the continued operation of the Code; that it was very foolish of any dealer not to live up to something they had been fighting for twenty years to obtain, in other words some regulation permitting the operation of business at a profit.

Eziel Koepel.

Sworn to before me this 7th day day of September, 1934.
Jerome H. Brill, Notary Public, Bronx County. Bronx Co. Clk's No. 138 Reg. No. 59 B 36; N. Y. Co. Clk's No. 750 Reg. No. 6 B 422; Kings Co. Clk's No. 232 Reg. No. 6310; Commission expires March 30, 1936.

[fol. 332] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF STEPHAN BAYERS

STATE OF NEW YORK,
County of New York, ss:

Stephan Bayers, being duly sworn, deposes and says: That he is president of Bayers Chevrolet Co., Chevrolet automobile dealers located at Steinway Street in Long Island City, New York.

That he has read that part of the reply affidavit of David B. Spielman, verified the 28th day of August, 1934, which refers to deponent, more particularly on pages 51 and 52 of said affidavit.

Deponent is amazed at the statements contained therein and emphatically denies same.

The sum total of deponent's contact with said Spielman was a telephone conversation had with him. Spielman asked deponent to sign an affidavit to the effect that deponent was opposed to the Code. This deponent refused to do. Deponent stated that the Code was a wonderful thing for the dealers, and that deponent was for the Code 100%.

Stephan Bayers.

Sworn to before me this 7th day of September, 1934.
Jerome H. Brill, Notary Public.

[fol. 333] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF IRENE KEENAN

CITY AND STATE OF NEW YORK,
County of New York, ss:

Irene Keenan being duly sworn deposes and says:

That she is employed as Secretary to John B. Hulett, Commissoner for the Metropolitan New York District for the New York State Advisory Committee for the Motor Vehicle Retailing Trade Code.

I have read that part of the reply affidavit of David B. Spielman verified August 28, 1934 which refers to me more particularly on Page 23 thereof.

I deny that I ever told the said Spielman that the complainant herein Spielman Motor Sales Co. Inc. "was in very serious trouble".

I aver emphatically that I never made any such statement.

(Signed) Irene Keenan.

Sworn to before me this 8th day of September, 1934.
Jerome H. Brill, Notary Public, Bronx County. Bronx Co. Clk's No. 138, Reg. No. 59B36; N. Y. Co. Clk's No. 750, Reg. No. 6B422; Kings Co. Clk's No. 232, Reg. No. 6310; Commission expires March 30, 1936.

[fol. 334] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JOHN G. GROSS

STATE OF NEW YORK,
County of New York, ss:

John G. Gross being duly sworn deposes and says:

That I reside at 20 East 76th Street, in the Borough of Manhattan, City of New York.

That on or about June 13, 1934 at about 1 P. M. in the company of one Millard F. Borror who resides at 112-12 Myrtle Avenue, Richmond Hill, County of Queens, State of New York, I called upon one Gabriel Cohen at premises at 30 Broad Street, Borough of Manhattan, City of New York in order to investigate a complaint against Spielman Motor Sales Co. Inc. in which the said Cohen was the purchaser of an automobile.

I have read the affidavit of the said Gabriel Cohen verified the 28th day of August, 1934 which is annexed to the reply affidavit of David B. Spielman herein.

I deny emphatically that either I or Mr. Borror at any time stated to the said Cohen that "there have been numerous complaints lodged against Spielman Motor Sales Co. Inc. with the Code authority" as alleged in the said Cohen's affidavit.

I also deny that at any time did we admonish or warn the said Cohen that if he did not sign a statement as to the facts of his transaction with Spielman Motor Sales Co. Inc. he would be compelled to appear as a witness if crim-
[fol. 335] inal action were taken on this transaction.

I deny that either Mr. Borror or I at any time in our conversation with the said Cohen cast any reflections upon the name of Spielman Motor Sales Co. Inc.

I aver that all that happened was that Mr. Borror and I wrote down the facts of the transaction in which the said Cohen purchased an automobile from Spielman Motor Sales Co. Inc. and requested the said Cohen to sign a statement of the facts. This request was made of Mr. Cohen in order that we might have a record of his version of the transaction. Neither Mr. Borror or I at any time warned or

admonished the said Cohen in order to induce him to sign said statement.

Upon his refusal to sign the said statement we left.

(Signed) John G. Gross.

Sworn to before me this 8th day of September, 1934.
Jerome H. Brill, Notary Public, Bronx County. Bronx Co. Clk's No. 138, Reg. No. 59B36; N. Y. Co. Clk's No. 750, Reg. No. 6B422; Kings Co. Clk's No. 232, Reg. No. 6310; Commission expires March 30, 1936.

[fol. 336] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LOUIS H. WESSELS

STATE OF NEW YORK,
City of New York,
County of New York, ss:

I, Louis H. Wessels, being duly sworn depose and say; that on August 14th, J. B. Hulett, Administrator of the Motor Vehicle Retailing Code of Fair Practice of Metropolitan New York, instructed me to proceed to my territory, counties of Westchester and Rockland *County* in New York State, and visit as many dealers as possible during the following day and to secure from the dealer voluntary signature to an affidavit to the effect that it was their desire that the existing Automobile Code be continued.

On that day, the fourteenth, I secured four affidavits in Rockland County, working that evening. On the following day, the fifteenth, traveling by motor car and covering in all approximately one hundred and twenty-five miles, secured affidavits for the balance, to wit; twenty-five, a total of twenty-nine, finding executives in almost every instance, and after reading did willingly, and in some cases eagerly sign the affidavit which I placed before them, realizing as they did that the affidavit as presented was absolutely true and that should the Code be eliminated it would mean a return of the old cut-throat method of doing business, and in a good many instances a total elimination of a number of dealers who voiced their opinion in no uncertain terms,

such as "when the Code goes out, I go out", "should this Code fail, I'll put the key in the lock", and "I don't see why after waiting twenty years for just this very thing to happen and it drops into the dealers' laps, why some of these birds are trying to kill it", is putting it very mildly as to the feeling existing among dealers in the area of this office.

It so happened that the twenty-nine aforementioned affidavits was all that I had with me, and could have secured double and yes, triple the number had it been physically possible to do so in the limited time that of one day. A number of the dealers I visited in this territory were either away on vacations or away for the day. When I found a dealer out I left the document with a request to read and [fol. 337] sign if he desired to do so, and picked it up later in the day, signed. Only in one instance did I find a dealer who refused to sign it, and he only would I am quite sure sign, had I been willing to wait and enter into a lengthy discussion with him regarding it, and because of the time limit and for that only, I refused to do so, inasmuch as my orders were to return the complete affidavit to the office on the evening of the fifteenth, and at no time, if the dealer was not in accord with the wording of the affidavit, were they asked to sign. In fact they were told that they did not have to sign if they did not wish to do so, and that no pressure or influence of any sort was used in asking the dealers to sign this document.

(Signed) Louis H. Wessells.

Sworn to before me this, 6 day of Sept. 1934. G. L. Schutzendorf, Notary Public, Nassau Co. #1685, N. Y. Co. #1196.

[fol. 338] In United States District Court

Affidavits of G. E. Porter and H. V. Flannery

State of New York,
City of New York,
County of New York, ss:

G. E. Porter and H. V. Flannery, being duly sworn deposes and says; that in the evening of August 14th, 1934,

J. B. Hulett, Administrator of the Motor Vehicle Retailing Code of Metropolitan New York, instructed them to proceed the following morning into the Queens County territory, and there visit as many dealers as time would permit during that day, and to obtain from those dealers their voluntary signature to an affidavit, in substance, to the effect that they desired the continued existence of the Automobile Code.

Deponents further say, that from about 9 A. M. in the morning of August 15th, 1934, to about 7 P. M. of the same day they covered, in an automobile, distance approximating eighty miles, visiting in the Queens County territory the stores of thirty dealers, and finding officers in only twenty-three of them; that twenty of the dealers executed the affidavits placed before them, their consensus of opinion being that the meaning contained in the said affidavit was absolutely true, and that in the event the Code was eliminated it would mean the return of very difficult times for the dealer; that the visit to each dealer averaged about ten minutes, and that two of the three dealers, who did not execute an affidavit, desired that they be given a little time to discuss it with other members of their company, but which we told them we could not favor because we were instructed to return the completed affidavits to the office that evening.

Deponents further say that upon their arrival at each dealer's store they requested that the dealer read the affidavit, and that if not in agreement with the wording of it to be sure to say so, that they were not expected to sign anything with which they were not in accord; that we had only a few minutes to spend with him for we were forced [fol. 339] to cover a lot of territory during the day; that in our visits to the several dealers no pressure or influence of any nature whatsoever was manifested by us, and that in several cases dealers wanted to discuss some violation in their territory, but by reason of our time being limited we assured them we would return and talk over with them the other subjects which they had in mind.

Deponents further say that the enthusiasm on the part of the dealers to defend any possible loss of the Code to them was inspiring, and it would appear from their quick reaction that they would vigorously oppose any attempt to deprive them of a vehicle that is gradually returning

the automobile industry to its original high rank in the field of industry.

Deponents further say that if more time had been available they could undoubtedly have obtained assent from more than 85 per cent of the additional dealers, and that this statement is based upon the warm interest of those dealers from whom affidavits had already been obtained.

(Signed) George E. Porter; (Signed) H. V. Flannery.

Sworn to before me this 5 day of Sept. 1934. G. L. Schutzendorf, Notary Public, Nassau Co. #1685, N. Y. Co. #1196.

[fol. 340] In United States District Court

Affidavit of John G. Gross and Gerald Foley

State of New York,
County of New York,
City of New York, ss:

I, John G. Gross, and I Gerald Foley, being duly sworn depose and say that on the afternoon of August 15th, 1934, J. B. Hulett, Administrator of the Motor Vehicle Retailing Code of Metropolitan New York instructed us to proceed the following morning through Kings and New York Counties calling upon as many dealers as time would permit in an effort to obtain from these dealers their voluntary signatures to an affidavit substantially that they desired the continued existence of the Motor Vehicle Retailing Code. From about 9:00 A. M. to 6:00 P. M. on August the 16th, we called on twenty-eight (28) dealers. Of these twenty-eight (28) dealers seven (7) were not in, five (5) either could not or would not sign the affidavit and sixteen (16) did sign. Of these sixteen (16) nine (9) signed on August 20th and in the other seven (7) cases, it was necessary to leave copies for dealers to take up with their partners or to think over. However, all seven (7) signed the following day, August 17th, 1934.

We instructed all dealers visited to read the affidavit closely, and that if they could not honestly sign it, not to do so. There was absolutely no coercion or even persuasion

on our part to obtain signatures. The attitude of all dealers was that the Code was a good thing and they expressed their desire for stricter enforcement. This was even true in the cases of the dealers refusing to sign.

Sworn to before me this 7 day of Sept. 1934. G. L. Schutzendorf, Notary Public, Nassau Co. No. 1685, N. Y. Co. #1196.

Signed: John G. Gross
Signed: Gerald Foley.

[fol. 341] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JACK FROST

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Jack Frost, being first duly sworn, deposes and says: That I am the assistant to Mr. F. W. A. Vesper, President of the National Automobile Dealers Association. Said Association being the duly authorized Association for compiling and publishing the Official Guide Book referred to in the Code of Fair Competition for the Motor Vehicle Retailing Trade. I have heretofore executed and filed an affidavit in the above-entitled matter. This affidavit is executed in answer to complainant Spielman's affidavit and analysis of my previous affidavit. I have made no attempt herein to touch all the various argumentative statements in complainant's affidavit. I hereinafter set forth some of the vital discrepancies which I deem pertinent in this matter.

[fol. 342] Page 76 of Mr. Spielman's analysis of the Affidavit of Mr. Frost states:

"I challenge Mr. Frost to suggest any method * * * to correct inequalities or inequities * * *"

Mr. Spielman is a member of the National Automobile Dealers Association. He has been sent all of the bulletins of that Association since his membership was put in force. Mr. Spielman has also received various communications from the New York State Advisory Committee offices. The

information thus supplied has kept Mr. Spielman fully informed of the structure of the Code enforcement and administrative organization. He therefore knew that he had open to him and all other dealers, the privilege of taking his complaints to first, the properly elected State Advisory Committee, second, to the properly elected National Emergency Committee, and third, to the National Control Committee, and should he have chosen to go outside of the industry's administrative organization, he had the right of direct appeal to the National Recovery Administration officials at Washington. It is significant, therefore, that Mr. Spielman has never communicated with the National Control Committee at any time prior to his filing of this complaint, and furthermore, it is significant that he could not find the time to appear at Washington throughout the many months that the Code has been in effect. Oral objections he claims to have raised have never come to the attention of either the National Emergency Committee, the National Control Committee or even the National Automobile Dealers Association prior to his filing of this complaint.

Page 78 of Mr. Spielman's analysis * * * states:

"* * * Mr. Frost characterizes the practice of trading in automobiles as the vice of the industry * * *"

"On page 16 of my Affidavit I use the words "vice" and "trouble," but it must be noted that this paragraph continues into page 17. Herein it is explained that the "over allowance" and the "allowance errors" are the root of the trouble which in the end brought various results. A proper [fol. 343] handling of the used car can place this department of the industry on a business-like basis and permit it to function as an enterprise which can keep faith with consumer interest. In my affidavit an explanation is offered showing the development of this phase of the business which in the end became a major factor for consideration in the writing of fair trade practices in this industry.

On page 78 of Mr. Spielman's analysis, he quotes from a letter addressed by himself to Administrator K. J. Ammerman of the National Recovery Administration. A reading of this letter indicates conclusively that Mr. Spielman's objection was pointed at the element of non-enforcement of these price regulations, but positively makes no definite objection to the marketing rules or price regulations as such. He refers to his experience stating, "That the non-

enforcement of these price regulations has been an ideal smoke screen for an unscrupulous dealer to work behind * * *" No direct objection to the regulation is made in any fashion whatever.

Page 78 of Mr. Spielman's analysis * * * states:

"I cannot understand the significance of these remarks, the figure 21% is cited * * *"

Here Mr. Spielman endeavors to point out a discrepancy between my reference to the 21% found through the National Recovery Administration analysis of five hundred automobile dealers' handling and reconditioning costs.

It should be noted that in my reference to the 21%, I distinctly state * * *, "It was found that the average cost of these five hundred dealers amounted to 21% for handling and reconditioning the used cars"

This reference is connected with my analysis of the reconditioning expense and an attempt is made here to prove that one group of percentages belies the other. The reference to 21% includes both the cost of reconditioning and the [fol. 344] cost of handling. The cost of handling is that cost in the nature of commissions to salesmen, salaries, rent, lights, advertising, etc., which the dealer pays for the operation of his used car department. Reconditioning expense is distinctly that which is applied to the used motor vehicle in the nature of repairs, adjustments, etc., preparatory to its resale by the dealer.

The addition of reconditioning expense percentages to operating expense percentages brought out the figure 21% referred to in the analysis made by the National Recovery Administration. In this same discussion Mr. Spielman refers to these percentages and asks the question * * * "21% of what?"

The percentages referred to are applied to the sales price of the used cars handled. When the total dollar volume of used car sales is considered against the total amount of handling and/or reconditioning expense, these percentages are the result referred to in my affidavit.

Page 79 of Mr. Spielman's analysis * * * Mr. Spielman states that there are 45,000 automobile dealers in the United States. His figure of 45,000 is very inaccurate and definitely inflated. The Code Authority of the Motor Vehicle Retailing Trade can supply the court with the best recog-

nized list of the number of new car dealers in the United States.

Mr. Spielman refers to the analysis of five hundred dealers being an inadequate analysis. This analysis could be continued over many thousands of dealers and I am able to assure the court that the result in percentages would change only slightly.

Mr. Spielman strictly avoids challenge of the analysis made by the National Automobile Dealers Association of reconditioning expenses wherein I compare those percentages to the mandatory Code deductions. Since he realizes that the Association is fully equipped with the best information of this type available to the industry, it should be noted that over 150,000 used car sales were analyzed in the de- [fol. 345] velopment of these percentages. It is therefore true that the Code does fix too low a figure for mandatory deductions when the costs of reconditioning and operating expenses are added together.

Page 81 of Mr. Spielman's analysis of the affidavit • • •

Mr. Spielman here refers to my affidavit concerning the condition of this industry at the time this Code was written, and also refers to the position in which salesmen found themselves.

The voice of no less than twenty-five to thirty thousand dealers will sustain my contention that salesmen had become discouraged since their natural function of developing and closing business had been so impaired through the evil of over allowances.

Furthermore, the same voice of this great industry quickly proves that Mr. Spielman is quite alone with a definite and small minority when he states that the financial condition of the automobile dealers of this nation was virtually one in which only twenty percent were on the verge of insolvency. Irrespective of the effects of the depression, the business of automobile retailing would have unquestionably come to this same point almost as soon if — had not some business-like basis for treating with the used car problem been reached.

Mr. Spielman offers no concrete rebuttal of this statement other than the voicing of his own opinion. It should therefore be noted that if this Code were not necessary, and if the dealers of this nation did not want this Code, similar complaints to Mr. Spielman's would have been

brought before the courts of this country by the thousands, and, brought many months ago.

The National Automobile Dealers Association can supply, if given a period of two weeks within which to request the information, affidavits from no less than twenty-five thousand automobile dealers, and from every section of the United States, which affidavits will clearly state that this Code is a necessity to the business of automobile retailing, and it is their wish and demand that it be enforced.

[fol. 346] On page 82 and Page 83 of Mr. Spielman's analysis . . .

Here Mr. Spielman broadly refers to the effects of the depression on the automobile retailing industry. He adroitly avoids the pertinent points in my affidavit concerning the effect of over allowance and vicious trading practices which forced selling below cost. His reference to the relation of banks to automobile dealers: He compares the department stores adjustment of sales prices to that forced adjustment effected through the trading in of used cars. It is interesting to note that the department stores adjust the selling price of their new merchandise, and likewise do the automobile manufacturers adjust the selling price of their new automobiles, and at the same time to realize that it is rather difficult to trade in a one year old shirt on the purchase of a new shirt in any department store in this country.

Mr. Spielman refers to the records of Dunn & Bradstreet. It would be most interesting if the court would examine the views held by Dunn & Bradstreet in connection with the Motor Vehicle Retailing industry. That organization would quickly supply specific data supporting my contention that the over-allowance and erroneous allowance factors have been the evil of the business of motor vehicle retailing.

The Banks of this country will quickly advise that the basic fault they found in the automobile dealership was the factor of over-allowance on the value of the used car.

Mr. Spielman offers no explanation of why the automobile industry fell to points below the indexes of other industries supplying the public with necessities. His reference to the desire of banks to bend backward in conservatism to remain liquid is most inconsistent with the tone of his complaint from which we might assume the business

of motor vehicle retailing needed no help in the way of fair trade practice. If the motor vehicle retailing business was as good through these years as he would have the court believe, surely the banks would have viewed it as a safe-
[fol. 347] ground and therefore would have loaned to an industry able to regularly liquidate its loans.

Mr. Spielman avoids any discussion of the fact that the automobile dealer is quite generally unable to enter and leave the business at his pleasure and not find himself confronted with vast liabilities which can quite easily bankrupt him. The automobile business has the peculiarity of requiring the special type of buildings, and when the dealer launches his enterprise he, with few exceptions, is forced to take a lease of a substantial character. Thousands of dealers have entered this business with an allowed territory under their factory franchises, and have had places built with special design to suit their needs. In addition to this fact, most dealers are forced to endorse the contracts concerning the sales of their new cars on time payment plans, and since failure to meet payments on the part of the purchaser brings numerous repossessions, the dealer must have an outlet for the disposal of these repossessed cars, or otherwise suffer considerable loss in most instances. These two factors make it most difficult for him to leave this business without continuing liabilities.

"On Page 84 of Mr. Spielman's analysis • • • "

Reference is here made to good will.

No reference is made in my affidavit to the sale of good will.

[fol. 348] Page 87 of Mr. Spielman's analysis of the Affidavit of Mr. Frost.

It should be noted that considerable stress is laid on this particular argument of Mr. Spielman's, and that my affidavit is attacked vigorously since there is a definite endeavor to use this point as a basis of many pages of his following contentions.

The National Automobile Chamber of Commerce in its 1934 edition of Automobile Facts and Figures is the basis for Mr. Spielman's argument. The average life of a motor vehicle is established at 92 months.

The argument continues with a reference to a rate of depreciation of 1-1/10% per month for 92 months which would obviously result in approximately 100% depreciation.

This is a most interesting highly erratic conclusion since in my affidavit the reference to a rate of 2½% per month to 3½% per month is apparently entirely misunderstood. The rate of depreciation referred to in my affidavit is the result of the handling of hundreds of thousands of averages and of the comparing of averages developed in one period as against a later period. In the comparing of these averages it should be noted that I refer distinctly to a rate of depreciation thus made apparent and which therefore could be applied to each month for purpose of analysis. A contention is made in Mr. Spielman's argument that would indicate that the life of a motor vehicle instead of being 7-2/3 years is claimed by myself to be 2½ to 3 years. This is entirely in error since Mr. Spielman has erred in his calculations as to how a rate of depreciation would be figured and also what would be the basis of the rate. Since the rate of depreciation in my affidavit is purely the result of a comparison of the various averages which developed on particular types over different periods, the application of the percentages of 2½ or 3½% must be made to the last value published. In order to entirely clarify the error of Mr. Spielman's conclusions and to show distinctly the obvious correctness of the publication, Automobile Facts [fol. 349] and Figures, from which source Mr. Spielman has drawn a grossly erratic conclusion the following table is set forth: The first figure shown in the table is $700.00. This figure we might assume is an average developed on a certain car at a particular period. The figure also could be considered as the price of a new motor vehicle, and from which price depreciation at a rate of 2½% per month would normally bring its value in six months, 12 months or 7 years to a specific value or point. Taking the first section of 6 months, it can be seen that the rate of 2½% per month brings its value from $700 down to $601.37. Taking the next six months, the value comes to a point of $516.75. An additional 12 months would bring its value to $381.51, and an additional 12 months and another additional 12 months would bring its value to $283.19. An additional 24 months would bring its value to $154.36, and another additional 12 months would bring its value to $113.97. It will be noted that the car is now 6 years old, presuming that the rate was figured from a new price of $700.00, it still has a remaining value of $113.97. Following this table to a point of Mr.

Spielman's conclusions which is 92 months, we find that the car still has a value of $68.77.

The following table therefore proves that the life of the vehicle is quite well estimated by the National Automobile Chamber of Commerce. It also proves the correctness of the conclusions in my affidavit.

Mr. Spielman would have to apply 1-1/10% to the original car price and thereby get an equal amount of monthly drop or depreciation in the 92nd month with the very first month. His entire conclusion is most erratic therefore and leaves his reasoning without base:

[fol. 350]

$700.00	$17.50	$682.50
682.50	17.06	665.44
665.44	16.63	648.81
648.81	16.22	632.59
632.59	15.81	616.78
616.78	15.41	60137
601.37	15.03	586.34
586.34	14.65	571.69
571.69	14.29	557.40
557.40	13.93	543.47
543.47	13.58	529.89
529.89	13.14	516.75
516.75	12.91	503.94
503.94	12.59	491.35
491.35	12.28	479.07
479.07	11.97	467.10
467.10	11.67	455.43
455.43	11.38	444.05
444.05	11.10	432.95
432.95	10.81	422.14
422.14	10.55	411.59
411.59	10.28	401.31
401.31	10.02	391.29
391.29	9.78	381.51
381.51	9.53	372.98
372.98	9.32	364.66
364.66	9.11	355.55
355.55	8.88	346.67

346.67	8.66	338.01
338.01	8.45	329.56
329.56	8.23	321.33
321.33	8.02	313.31
313.31	7.82	305.49
305.49	7.62	297.87
297.87	7.43	290.44
290.44	7.25	283.19
283.19	7.07	276.12
276.12	6.90	269.22
269.22	6.72	262.50
262.50	6.56	255.94
255.94	6.38	249.56
249.56	6.23	243.33
243.33	6.07	237.26
237.26	5.92	231.34
231.34	5.78	225.56
225.56	5.63	219.93
219.93	5.49	214.44
214.44	5.36	209.08
209.08	5.22	203.86
203.86	5.09	198.77
198.77	4.96	193.81
193.81	4.84	188.97
188.97	4.72	184.25
184.25	4.60	179.65

[fol. 351]

179.65	4.49	175.16
175.16	4.37	170.79
170.79	4.26	166.53
166.53	4.16	162.37
162.37	4.06	158.31
158.31	3.95	154.36
154.36	3.85	150.51
150.51	3.76	146.75
146.75	3.66	143.09
143.09	3.57	139.52
139.52	3.48	136.04
136.04	3.40	132.64
132.64	3.31	129.33
129.33	3.23	126.10

126.10	3.15	122.95
122.95	3.07	119.88
119.88	2.99	116.89
116.89	2.92	113.97
113.97	2.84	111.13
111.13	2.77	108.36
108.36	2.70	105.66
105.66	2.64	103.02
103.02	2.57	100.45
100.45	2.50	97.95
97.95	2.44	95.51
95.51	2.38	93.13
93.13	2.32	90.81
90.81	2.27	88.54
88.54	2.21	86.33
86.33	2.15	84.18
84.18	2.10	82.08
82.08	2.05	80.03
80.03	2.00	78.03
78.03	1.95	76.08
76.08	1.90	74.18
74.18	1.85	72.33
72.33	1.80	70.53
70.53	1.76	68.77

—92 months

The court will please note that the above table was developed in a most hurried condition, and possibly inaccuracies can be found therein.

[fol. 352] In my affidavit reference to the rate of depreciation is made directly in connection with the guide book at any particular point and shows the relationship of the monthly rate of decline as above proven in its relationship to the market in which the book is used.

Page 93 of Mr. Spielman's analysis sets forth an example of how a sale can be made and reported at a figure less than the amount of the sale. An arbitrary conclusion is reached by the pointing out of a car worth $500, but no mention was made as to by what standard Mr. Spielman establishes this car's worth. Secondly reference is made to a trade-in which has a true value of $150, but upon which the guide book establishes a maximum allowance of only $100.

Notice should be taken of these two points in connection with my affidavit concerning the analysis of all of Mr. Spielman's used car sales which were reported to the Association. This analysis correctly proves that Mr. Spielman, regardless of his other contentions, was unable to dispose of the used cars he accepted in trade at figures even as high as the guide book in a majority of the instances pointed out. Continuing in this same line of argument, Mr. Spielman avoids discussing the instances which offset his hypothetical example. No reference is made to the car which he has for sale worth $450, and upon which a prospect offers a trade-in with a book value of $150 but an actual value of only $100.

No notice is taken of the fact that sales are made in many instances (and on this point I refer the court to any reputable finance company) wherein the price of $450 is elevated to $500 in order that the dealer may allow $150 for a car worth $100. Such sales are reported to the Association at $500 and concern a car which had only a worth of $450.

It should be noted further that when a used car is traded-in on another used car purchase that the basic reason for such exchange is that the car traded in no longer gives satisfactory service since such trades in the main are in substandard condition when offered for trade on other used cars to be purchased.

[fol. 353] Consequently, since the buyer of another used car would ordinarily purchase a new car, were he financially able, it can be seen that the great bulk of such trades are cars which are offered by reason of their substandard condition and the need of the purchaser for better transportation.

Therefore, if it is true that the force of competition causes the dealer to frequently go the limit of the maximum allowance, quite obviously the example Mr. Spielman sets forth could be reversed as above explained, with better and more logical reason.

[fol. 354] Page 88 of Mr. Spielman's analysis:

Mr. Spielman states that the elimination of the marginal twenty percent reported sales as junk sales is truly a fair approximation of junk sales. In the handling of hundreds of thousands of used car sales reports, per month, and through the analysis of the statistics there developed, the National Automobile Dealers Association is prepared to prove be-

yond question of doubt that the example set forth in my affidavit showing the elimination of twenty percent to be a factor which distinctly raises the resultant average by its inclusion not only of junk sales but sales of automobiles far above the class referred to as junk. This is a statement founded on absolute fact and which we can support by an enormous volume of statistical proof. The reference made to the number of automobiles which fall in the junk classification has positively no bearing or reference to that contained in my affidavit, which pertains to the number of cars of each particular type, model and year, which when thrown into a set of samples from which the lowest twenty percent must be eliminated thereby raises the average as pointed out and proves an entirely different point than the one referred to in Mr. Spielman's reference. Of the approximate 25,000,000 cars operating in the United States, Mr. Spielman contends that a certain percentage is junk. We do not average all years and makes together. It should be noted that this number included all makes, types and models. My reference is distinctly to those cars of the same type and model and therefore Mr. Spielman's conclusions are in error since they are not pointed at the facts in my affidavit. Further reference is made to the publication of "Facts and Figures" compiled by the National Automobile Dealers Association. The publication "Facts and Figures" is not compiled and published by the National Automobile Dealers Association.

Reference is made to my affidavit contending that I claim the marginal twenty percent would not contemplate any junk sales. This is a misstatement of the facts contained in my affidavit. On Page 26 of my affidavit the following statement is made, "by reason of this provision sales which concern junk or wrecked cars are automatically eliminated from [fol. 355] any consideration in the average but so also are sales which are not of such a nature as to be termed "junk" or "wrecked" types."

"The deletion of the low twenty percent elminates from use in the average final tabulation, many sales which run within a few dollars of the medium average of all sales concerned."

The National Automobile Dealers Association will be pleased to supply veritable volumes of statistical tabulations concerning each or any guide book to date published definitely proving this point.

Page 89, Mr. Spielman analysis • • •

Reference is here made to seasonable variations of the used car market. Four examples are set forth which are definite exceptions but which most ably prove the accuracy of the statement in my affidavit concerning the fact that when the market rises the guide book responds to the change. While the calculations are based on sixty day periods, the publication of figures is made each thirty days. Quite obviously an overlap is thus effected which brings into the guide each thirty days those changes occurring in the market.

The illustrations referred to in Mr. Spielman's analysis are excellent proof of the manner in which the guide follows changes in the market.

Reference is made to particular seasons and even to particular months, stating without offering other than the opinion of Mr. Spielman that the market makes definite changes at particular periods. Since Mr. Spielman's used car sales are only a small fraction of the total of makes and models recorded in the guide book, it is obvious that without the guide as a basis for his statements he is completely without source of proof concerning his statements regarding market changes.

Temporary upturns in the used car market caused through increased demands and the character of supply are quickly and expediently given to the trade through the publication of the guide each thirty days. No reference in Mr. Spielman's analysis points out the fact that the ensuing thirty [fol. 356] or sixty days from such an upturn (which is both the exception and unusual) would bring to the ensuing period figures again higher than those referred to in my affidavit. The illustrations set forth treat carefully, it must be noted, with 1933 Chevrolet values, while at the same time no reference is made to the increase in new car prices put in effect by the Chevrolet Motor Company approximately during this same period. Such increases in new car prices have their influence particularly on cars of the immediately preceding model.

The illustrations pointed to by Mr. Spielman are therefore most excellent proof of the care with which this guide is developed and of the soundness of the formula and of the accuracy in which it follows the market on the best grade automobiles.

On page 91 and page 92, Mr. Spielman discusses the operation of a used car department setting forth figures concerning the number of his sales during the years 1931, 1932 and 1933, and stating that he is one of the largest automobile dealers in New York. These figures can be most enlightening when considered along with the the discussion. An admission that there are 5,000 different types of appraisals in copy agreement with my affidavit. An admission that it is necessary to properly recondition cars for resale and to spend money therefore is also made. An admission stating that a dealer must be able to buy his cars for not more than that which he can resell them should excite keen interest. These facts are basic and will be found also in my affidavit showing this point in its proper light.

The number of the complainants sales average slightly over one hundred per month. Elsewhere in this analysis, Mr. Spielman admits that a dealer handles many used cars of his own make. Obviously a number of these one hundred approximate sales per month are Chevrolet automobiles. Therefore Mr. Spielman furnishes in his own analysis affidavit specific proof that against a market ever changing and which concerns over 5,000 different types of appraisal, he, from his own experience, is able to determine values in a ratio of 100 to 5,000 of the appraisal types he may be [fol. 357] confronted with.

Page 94 of Mr. Spielman's analysis states "The complainant has strictly complied with every provision of this Code of Fair Competition, most of the dealers engaged in the metropolitan area of the City of New York have been forced through the economic necessity of sustaining themselves to violate provisions of the Code. • • •"

Mr. Spielman here charges virtually every red-blooded American citizen engaged in the Motor Vehicle Retailing Trade in the City of New York of practicing dishonestly and in violation of the Federal laws.

This statement is made to influence the court and is the greatest insult I have ever heard pertaining to this or any other American industry.

Mr. Spielman continues with the statement that the only trade-ins that he accepted were worth less than the average established by the guide book for the most part. It therefore should be interesting to note in the analysis of Mr. Spielman's own sales that there are numerous trades on which he did not allow as much as the Code permitted if

he follows what he claims as one of his principles of operating a used car department—allowing no more than he can resell the car for.

Mr. Spielman further states that he has accumulated a mass of cars practically all of which were accepted in trade at a price less than the average which represents the maximum trade-in allowance, proving this point. If after accepting these cars he does a proper job of reconditioning which then brings them up to a condition of better or best grade cars I am at a loss to understand why he was unable to sell these particular cars at figures as high or higher than the guide book. Nothing whatever prevents Mr. Spielman from selling these cars at any price he may be able, and it should be noted that the average automobile is a physical thing which can be repaired, repainted and thereby be put in a condition which often can bring it to the classification of best grade.

[fol. 358] Mr. Spielman's own reasoning therefore specifically again proves that the official guide is a report concerning best grade cars, and therefore establishes a value which quite apparently in his business has worked but little limitation on the amount of allowance he can make, while he pursues the practice of operating a used car department in which he claims he should not allow more than he can resell the used car for. Mr. Spielman makes no reference in this analysis affidavit to his first affidavit in which he stated that he was one of the largest dealers in New York, and from which statement we must draw the inference that he still is one of the largest dealers in New York. The amount of his volume of sales therefore has apparently not declined as we must infer he contends elsewhere in this analysis.

Mr. Spielman also contends in other points of his analysis of my affidavit that the comparisons that were made concerning these sales were not based on that figure which is the maximum allowance and which is computed through the deduction from the sales prices published of the mandatory 5, 10 and 15%. Reading of this section of my affidavit would correctly prove that all reference made to amounts of allowance which Mr. Spielman could have made are specifically calculated on the guide book with the mandatory deductions taken off.

The St. Louis office of the Code Authority is the focal point in relation to the guide book and used car values of

the dealers of this nation. With practically every dealer in the nation now using the guide book, quite naturally this office bears the brunt of all complaints and criticism that can be made against the guide. We receive complaints against the guide from every section of the United States, but I am able to state and prove that each and all of these complaints over the past eight months have been, with the exception of not to exceed a handful, addressed to us in vigorous language stating that the guide book allowances are far too high. This further proves, when it is considered, that not a handful of complaints have been received [fol. 359] throughout this nation that the guide is too low during the last eight months that Mr. Spielman's own verbal statement made to me after the first hearing in this court was from the heart and I feel true in his opinion. In the presence of Mr. Southworth, Chairman of the New York State Advisory Committee, Mr. Spielman, in a friendly discussion with myself, verified and stated openly that the guide was too high when I remarked that it was singular that the majority of his sales were at less than the guide book figures. Mr. Spielman further stated that his real complaint against this Code was directed at the point of non-compliance, which he claimed to be the action of other dealers who were thus taking business away from him.

The National Automobile Dealers Association is a non-profit institution, and is owned and controlled by the dealers of this nation. Mr. Spielman makes broad statements in his analysis of my affidavit, which statements are not the result of studies of this problem entailing volumes of substantial statistics, but pure guess work, unsupported and easily proven in error. He states that the low 20% deletion has not increased the resultant published average in the face of our willingness to prove beyond question the accuracy of the statistical facts set forth in my affidavit. Mr. Spielman in one statement would have the court believe that there has never been a firm price established on new Chevrolet automobiles. He knows full well that the suggested delivered prices established by the automobile manufacturer are the basis of all of his selling prices for new motor vehicles. Mr. Spielman would have the court believe, that without cooperative action he could appraise each used car accurately, and yet he offers no suggestion of what standard of value he would employ in the face of

his admission that his own experience in the selling of used cars approximates only one small fraction of the number of cars he must measure the value on when appraising.

[fol. 360] Mr. Spielman is complaining that competition from other dealers, who he claims are violating the code, is taking business away from him, while at the same time elsewhere in his affidavit, on page 97, he endeavors to prove that dealers would not go the maximum foolishly.

On page 97 of Mr. Spielman's analysis of my affidavit, he states "dealers will not pay prices that run in excess of the true value of the vehicle, and consequently under such circumstances there is very little opportunity of over paying the purchaser of the new car."

This is surely inconsistent with his contention that he is losing business to other dealers who allow more than he will allow for the used car.

On page 97 and 98 of Mr. Spielman's analysis he refers to the return for questioning of certain sales reports. This is explained in full detail in my original affidavit, but in the light of his argument, it is interesting to note the following facts:

Mr. Spielman, irrespective of the abrupt nature of the letter with which the reports were returned was in no manner directed not to return these reports again to the Association if they were in order. Had he later returned these reports they would have been used in the tabulations then current, and as a consequence would have been sales coming from an even earlier period than that provided in the Code and used in the building of averages in a later official guide book. Copies were kept of each and every report returned, and also copies were kept of the letters of reply from dealers who expressed gratitude to the Association for having called their attention to the laxity in their offices when they made out these first reports. These letters can be quickly supplied.

On page 98 of Mr. Spielman's analysis, he states it is also difficult to understand how the National Automobile Dealers Association employed the used car sales reports of Mr. Spielman when after it had been returned to him it was never again forwarded to the National Automobile [fol. 361] Dealers Association. Quite obviously Mr. Spielman here admits one of two things—either the reports thus returned to him were incorrectly made out and he supplied

other reports on these sales in their stead, or Mr. Spielman had little or no interest in his own Association and its own official guide book, and did not take the trouble to return the reports if they were correct, and send a letter, as did many other dealers thanking the Association for its watchfulness and stating that the reports were correct and therefore should be used.

When reports are received today which show the year of the car to be in disagreement with the model of the car stipulated in the report, quite obviously, a report made out in this fashion is useless and not correct. The Association makes no effort to guess at which of the statements is correct. It is therefore necessary to return such reports to dealers for corrections. And I wish to add that it will continue to be the practice of this Association as long as dealers make inaccurate reports which obviously are not true on the face. Example: 1929 V8 Ford. No such car exists. I am also able to state that out of hundreds of thousands of reports received, only a very few today are received which have these inaccuracies above referred to.

This I think indicates the keen interest which is taken on the part of dealers in the building of their own official guide book, and is an interest which quite apparently is not taken by Mr. Spielman if it was true that he did not return the reports to us after they were questioned.

My affidavit and the exhibits attached to it in connection with this subject are complete, and Mr. Spielman's challenge on this point is merely one of accusing honest employees of dishonest practices. I did not state and we do not know whether or not he specifically again returned these reports.

Page 99 of Mr. Spielman's analysis. Mr. Spielman states that no prices are fixed by the automobile manufacturers. [fol. 362] He however does not explain what the factory list price of an automobile is that is generally seen advertised throughout the nation, and who does establish that price.

Mr. Spielman continues with the statement that the method of price regulation would very seriously tend to regiment all dealers in one single straight-jacket of one arbitrary price where the personality and service of each of the dealers would be seriously discounted. He would have the court believe that if the Spielman Motor Company

had not conducted its business along the lines laid down by the manufacturer with which it has its contract, and had sold Shevrolets at any price he chose, that this manufacturer would have been pleased with the operations and would have continued him in business, while he thus injured all dealers of his make near him. Quite obviously Mr. Spielman has sold Chevrolet cars at the price suggested by his factory over the period of years in which he has been a dealer. Mr. Spielman would convey the impression that what he calls price regulation would make all makes of cars sell at one single price, and entirely avoids discussing the competitive relations between various makers of cars which establishes free competition between makes and which is fully explained in my original affidavit. [fol. 363] I find nothing in Mr. Spielman's analysis of my affidavit which proves any of his points or contentions through the use of facts. His claims are most general, and his figures, where such are used, seem definitely to argue against his claim rather than for it. I appreciate that my affidavit is of an academic nature, and that the use of figures and statistics is quite general.

I have endeavored to be most conservative in my claims and at the same time wish to assure the court that whatever additional proof or data is required concerning any figures set forth, or statements made, can quickly be supplied.

Dated: September 6, 1934.

(Signed) Jack Frost.

Subscribed and sworn to before me this 6th day of September, 1934. (Signed) Burt Roberts, Notary Public in and for said County and State.

My commission expires March 28, 1937. (Notarial Seal.)

[fol. 364] *Duly sworn to by Jack Frost. Jurat omitted in printing.*

[fol. 365] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS BILL OF COMPLAINT

And now comes William C. Dodge, District Attorney of New York County, State of New York, defendant in the

above cause, and moves to dismiss the Bill of Complaint filed in this cause, and for reasons thereof states as follows:

1. Said Bill of Complaint fails to allege facts constituting an equitable cause of action or entitling the plaintiff to any relief whatever.

2. Said bill of Complaint shows on its face that the Court does not have jurisdiction to grant the relief prayed for or any relief whatever.

3. Said Bill of Complaint fails to allege facts showing the proper amount is involved to give the Court jurisdiction.

4. Said Bill of Complaint shows on its face that the plaintiff has an adequate and complete remedy at law.

[fol. 366] 5. Said Bill of Complaint fails to allege facts showing the plaintiff would suffer irreparable loss or damage.

6. The alleged cause of action contained in said Bill of Complaint amounts to a suit against the State of New York, of which this Court has no jurisdiction.

7. Said Bill of Complaint shows on its face that it seeks an injunction to stay proceedings in the Courts of the State of New York, which relief is prohibited by Section 265 of the Judicial Code (28 U. S. C. A. 379).

Wherefore defendant prays the judgment of this Court whether he shall further answer, and that he be dismissed with his costs.

David Blitzer, Harold H. Straus, Attorneys and Solicitors for Defendant.

[fol. 367] In United States District Court; Southern District of New York

Spielman Motor Sales Co., Inc., Complainant,

against

William C. Dodge, as District Attorney of New York County of the State of New York, Defendant

Before: Martin T. Manton, Circuit Judge, Robert P. Patterson and Murray Hulbert, District Judges compos-

ing a statutory court convened pursuant to § 380 of the United States Code.

Suit for injunction. An application for an injunction pendente lite is made. Motion denied.

John J. Bennett, Jr., Esq., Attorney General of the State of New York; Henry Epstein, Esq., Solicitor General, of Counsel. Miller, Paul & Placer, Esqs., Attorneys for Complainant; S. Frederick Placer, Esq., Isadore Paul, Esq., of Counsel. David Blitzer, Esq., Assistant District Attorney, Harold H. Straus, Esq., Special Assistant to the District Attorney, Solicitors for Defendant; Stanley Osserman, Esq., of Counsel. National Re-
[fol. 368] covery Administration, Amicus Curiae. Eugene Frederick Roth, Esq., Assistant Counsel, Litigation Division, National Recovery Administration, of Counsel.

OPINION—Filed Oct. 8, 1934

MANTON, Circuit Judge.

This suit, heard before a court convened pursuant to §380 United States Code, seeks to enjoin the enforcement of ch. 781 of the Laws of 1933 of New York because, it is said, the statute violates the Federal Constitution (14th Amendment) and the New York State Constitution (Art. 3, Sec. 17). The act is said to violate the latter because it constitutes an invalid delegation of legislative authority. The challenged act, passed in and of the National Industrial Recovery Act, has for its purpose the regulation by codes, duly adopted, of all industries which are subject to code regulation.

Pursuant to the National Industrial Recovery Act, approved June 16, 1933, a code of fair competition for the motor vehicle retailing trade was formulated and accepted by the President of the United States on October 3, 1933. By Art. 4, subdiv. (a) of the Code, a method of ascertaining the maximum allowance that may be made in the sale of a new car was fixed. This maximum is arrived at by averaging the actual sales prices of used cars of each make and model of car over a specified period in a particular trade area as reported by the members of the trade in sworn statements to the National Automobile Dealers Association. In arriving at this average, the lowest 20% of

all sales are eliminated, and from this average a deduction of from five to fifteen per cent must be made to compute the maximum allowance for trade-ins. The amount to be [fol. 369] so deducted depends upon the maturity of the model. The code also prohibits selling below, or giving a discount on, the factory list price of a new car plus certain expenses.

The plaintiff is an automobile dealer merchandising Chevrolet cars within the State in very substantial numbers annually. Plaintiff's principal objection to the automobile code adopted is directed to the trade-in transactions when a new motor car is purchased. It is claimed that any trade-in allowances against sale prices, rebates and other devices are used to defeat fixed price schedules for the second hand car.

The purpose of the Code is to regulate the amount to be allowed on used cars which are accepted by dealers in a trade-in transaction. Unregulated allowances were an evil which led to unfair competition. Under the State Act (Schackno Law) provision is made for enforcement, by the State of New York, of the codes adopted by the National Industrial Recovery Act, upon the filing of such codes with the Secretary of the State of New York. Thus the codes become the standard of competition in intrastate business. The automobile code was so filed with the Secretary of State. Under the code, prices of used cars are attempted to be fixed for trade-ins only. Otherwise the field as to used car prices and factory list prices of new cars is open and remains changeable at the will of the purchaser. The fixing or attempted fixing of prices for trade-ins is an attempt to cure an evil leading to unfair competition and, as such, is price regulation. That there may be a difference between the reasonable value of a used car in the open market and the maximum allowance permitted, under the code, on a trade-in would not necessarily mean a [fol. 370] discrimination unless it be that the allowance so fixed is arbitrary, unreasonable or capricious.

Price regulation by the code, filed pursuant to the act, does not violate the Constitution. Nebbia v. People, 291 U. S. 502. There is no deprivation of equal protection of the law. The code does not place plaintiff at a disadvantage or affect him adversely and this alone is fatal to the claim of denial of equal protection. Nor is plaintiff denied

due process by the statute's enforcement. There is an admitted power in the legislature to regulate existing economic evils by an appropriate regulation of business. Home Bldg. & Loan Asso. v. Blaisdell, 290 U. S. 398. The indirect result may be a restriction of freedom of contract.

Fixation of prices for trade-ins is based upon the fact, sufficient to satisfy the Legislature, that the retail automobile industry has been adversely affected by economic conditions sufficiently to create an emergency. In Nebbia v. People, supra, the court said on page 535, after referring to Munn v. Illinois (94 U. S. 113), that

"Many other decisions show that the private character of a business does not necessarily remove it from the realm of regulation of charges or prices."

And further:

"It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as [fol. 371] arbitrary or discriminatory. Wolff Packing Co. v. Industrial Court, 262 U. S. 520, 535. * * * These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells. * * *

If the law making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public."

The code method of ascertaining the maximum used-car allowance is reasonable. To be sure, all practical price regulation may have as a consequence some individual inequalities. But a price based on an average of business or of trades in the past is harmonious and seems to be founded in fairness. An average arrived at from the amounts some of which are in excess of and some below the means does not work for invalidity as long as the basic principle or method is fair. The principle of regulation of [fol. 372] price is fundamentally fair even though there is some reasonable disregard in individual cases. Such disregard is inherent in any broad social policy.

There are no facts found in the complaint and moving papers supporting the plaintiff's claim of an unfair difference between the maximum used-car allowance permitted by the code and the reasonable value of a car submitted for trade-in purposes. To support the plaintiff's case, it must be shown that the method of fixing the trade-in allowance is arbitrary or discriminatory, leading, by caprice or otherwise, to unreasonable discrepancies. No more reasonable method of regulation for the correction of an evil of unfair trade is pointed out. Without a convincing showing by specific instances of unreasonable differences between the maximum permitted under the code and the real market values, no general charge of unconstitutionality can be sustained. Jeffrey Mfg. Co. v. Blogg, 235 U. S. 571; Plymouth Coal Co. v. Pa., 232 U. S. 531.

Complaint is also made of the code provisions (Art. 4, sec. b, para. 2) giving regulations as to discounts and allowances by dealers. Maintenance of prices by manufacturers through contractual arrangements with dealers or agents have long existed. It is not price fixing; the ultimate price still remains in the will of the manufacturer's discretion. Such maintenance of prices by agents and dealers flows from the contractual relationships with other manufacturers and is permissible as well as legal. Appalachian Coals Inc. v. United States, 288 U. S. 344. Nothing alleged in the complaint points to an instance where the plaintiff sought to give a discount or rebate [fol. 373] under the regular price of a new car. The law may legalize by statute or administrative act what may be done by legal agreement.

This statute contained a sufficient declaration of the existence of an emergency. Ch. 781, Sec. 1, of the Laws of

1933 after pointing out the existence of a national emergency, recites that it is

"declared to be the policy of this state to cooperate in the furtherance of the objects and purposes declared in said act of the Congress, and each and every provision of this act shall be construed in accordance with the policy so declared, and to make uniform the standards of fair competition prevailing in intrastate commerce and industry with those of interstate commerce required by the provisions of the said National Industrial Recovery Act which are applicable in interstate commerce in the State of New York."

The right of a state legislature to recognize, in this period of economic stress, an emergency has been authoritatively decided. Home Bldg. & Loan Asso. v. Blaisdell, supra; Nebbia v. People, supra.

The Congress of the United States has frequently reposed wide powers and responsibility in the executive branch of our government and this legislation has withstood attack. Field v. Clark, 143 U. S. 649; United States v. Williams, 194 U. S. 279; United States v. Grimaud, 220 U. S. 506; J. W. Hampton, Jr. & Co. v. United States, 276 U. S. 394; Ryan v. Amazon Petroleum Corp., 71 Fed. 2, 1.

The National Industrial Recovery Act was far reaching in its effect upon industry. Its purpose, to contend with an emergency, is found in Title 1, Sec. 1 of the Act. To [fol. 374] supplement, strengthen and eliminate any conflicts in carrying out the policies of the government by reason of existing state laws, many states, including New York, have passed industrial recovery laws similar to the national act. The state law of New York was passed with an intent to cooperate with the national act for the general welfare.

The constitution, as submitted to the States for ratification, did not contain any one article guaranteeing the citizens any rights of "due process of law." It contained very few guarantees of personal rights in any form. Mott, Due Process of Law (1926) (15). The powers of the federal government are limited and their limit should not be transcended, as stated in McCulloch v. Md., 17 U. S. 315 (1819).

"But • • • the sound construction of the Constitution must allow to the national legislature that discretion,

with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and the spirit of the constitution, are constitutional."

The National Industrial Recovery Act as an emergency measure is limited to two years duration. Aside from the purpose of the act as stated, the method by which the act seeks to lessen destructive competition and curb the predatory business practices is first through voluntary coopera-
[fol. 375] tion and adjustment amongst the interested parties themselves. In this way the act is primarily a permissive rather than a mandatory statute. It accordingly enjoins rather than restricts industry's freedom of action in permitting certain types of collective action designed to promote the purposes of the act. If a certain industry chooses to take advantage of certain of the comprehensive features of the act regarded as beneficial to them, the act then requires that they do certain things designed to benefit the particular trade or industry and the country in general.

The constitutional issues conceded to be involved in testing the validity of the act concerned, are its mandatory as distinguished from its permissive features. Section 3 (d) of the Act is pertinent in this cause. By Section 3 the President is authorized to prescribe a code of fair competition for the trade or industry where abuses inimical to the public interest are prevalent, giving such code the effect and force of a voluntary code. The recovery act was enacted under the powers of Congress to regulate interstate and foreign commerce. The power to do so under the commerce clause of the Constitution must be recognized because of the long line of cases upholding a wide variety of regulatory legislation. The Lottery Cases, 188 U. S. 321; United States v. Ferger, 250 U. S. 199.

But the question is raised here as to whether Congress has attempted to use the power to regulate interstate commerce as the means of controlling intrastate production. By indirection local matters are capable of federal control. [fol. 376] Houston & Texas Ry. v. United States, 234 U. S.

342; Stafford v. Wallace, 258 U. S. 495. Hammer v. Dagenart (247 U. S. 251), to which reference is made in the plaintiff's brief, denied Congress the power over commerce which is subject to the regulatory powers of the individual states and held that the manufacture of goods is not commerce. This was a five to four decision of the Supreme Court and stands alone in a long line of decisions decided before and since. A series of acts and decisions (United States v. Hill, 248 U. S. 420; Brook v. United States, 267 U. S. 432), beginning with the Interstate Commerce Act of 1887 until the Transportation Act of 1927, have left little to the argument that products manufactured within the state even when intended to be sent across the state lines, are not subject to federal regulation. The Sherman Anti-trust Act of 1890 initiated regulation by Congress of contracts, combinations and monopolies in restraint of interstate commerce. The Federal Pure Food & Drug Act of 1906 barred from interstate commerce foods or drugs not inspected or labeled in accordance with the act. Other illustrations are found in the Meat Inspection Act (U. S. C. A. Title 21, § 71), the Safety Appliance Act (U. S. C. A. Title 45, §§ 1-7), the Employers Liability Act (U. S. C. A. Title 45, § 51), the Mann Act (U. S. C. A. Title 18, §§ 397-404) and the Hours of Service Act (U. S. C. A. Title 45, §§ 61-64). The Hawes-Cooper Act effective January 1, 1934, subjects prison-made goods sent from one state to another to the laws of the latter state.

The constitutionality of the application of a prescribed code, as distinguished from a voluntary code, must be determined in accordance with the relations of the particular industry to interstate or intrastate traffic and to the general [fol. 377] welfare of the nation regardless of the fact that the immediate operation of the subject of the code is confined to a particular locality. A state may exercise certain police powers, which seem to be unlimited (Home Bldg. Loan Asso. v. Blaisdell, 290 U. S. 398) but Congress may not do so as there are no federal police powers under the Constitution.

Authoritative decisions of the Supreme Court have considered the doctrine of business affected with the public interest. Marcus Brown Co. v. Feldman, 256 U. S. 170; Nebbia v. People, supra. But a business which is of little public consequence today may become affected with public

interest in later years and a business vital today may well become obsolete tomorrow. Thus the regulation may be valid for business of one sort in given circumstances and invalid for another sort or for the same sort of business in different circumstances. The test has always been one of reasonableness, and applying that test to the instant case, the claim of breach of the Constitution must fail.

The New York State Constitution, Article III, Section 17, provides:

"No act shall be passed which shall provide that any existing law or any part thereof shall be made or deemed a part of said act, or which shall enact that any existing law or part thereof shall be applicable except by inserting it in such act."

The Schackno Law in no manner makes the National Industrial Recovery Act a part of its provisions. It declares the policy of the state and its desire to make uniform the standards of fair competition prevailing in intrastate industry with those standards of interstate commerce re- [fol. 378] quired by the provisions of the National Industrial Recovery Act. As stated by Sec. 2 of the Shackno Law, the filing of the code with the Secretary of State regulated intrastate transactions and nowhere is there an adoption by statement or indication, of the National Industrial Recovery Act as a part of the act, nor is it made "applicable."

The code is but an administrative product of the executive's application of the National Industrial Recovery Act. It is not a law. By virtue of the Schackno Law it may, when filed, become enforceable under the state statute. The enforcement of the code provisions by the state within its own jurisdiction is no delegation or abdication of the legislative or other state functions as charged. The code as an administrative act of the national government is merely made fully enforceable in intrastate sales. Under the decisions of the New York State courts, the attack against the Schackno Law as a surrender of the state power under Art. III, Sec. 17 of the Constitution has failed.

The state legislature may provide that it would follow the provisions of the National Code, without further investigation as to details of standards such as those set up

in the code, in an effort to enforce the policy of Congress within the state in intrastate affairs.

The motion for an injunction is denied.

Martin T. Manton, Circuit Judge. Robert P. Patterson, District Judge. Murray Hulbert, District Judge.

Dated: October 5th, 1934.

[fol. 379] [File endorsement omitted.]

[fol. 380] IN UNITED STATES DISTRICT COURT

SPIELMAN MOTOR SALES CO. INC., Complainant,

against

WILLIAM C. DODGE, as District Attorney of New York County of the State of New York, Defendant

ORDER DISMISSING BILL OF COMPLAINT—Oct. 18, 1934

This cause having duly come on to be heard before a Special Statutory Court convened pursuant to Section 380 of the Judiciary Code comprised of Judges Martin T. Manton, Circuit Judge, Robert P. Patterson and Murray Hulbert, District Judges, on complainant's motion for a preliminary injunction and on defendant's motion to dismiss the Bill of Complaint;

Now, after reading and filing the Bill of Complaint, the motion to dismiss same, the affidavits submitted in complainant's behalf and the affidavits submitted in defendant's behalf and after hearing Miller, Paul & Placer, Esys., Isa-[fol. 381] dore Paul, Esq., of counsel, for complainant and David Blitzer, Esq., Assistant District Attorney by Harold H. Straus, Esq., Special Assistant to the District Attorney, John J. Bennett, Jr., Henry Epstein, Esq., Solicitor General of counsel, National Recovery Administration amicus curiæ, Eugene Frederick Roth, Esq., Assistant Counsel Litigation Division, of Counsel, for the defendant; it is

Ordered, that a preliminary injunction against the said defendant be and the same hereby is denied; and it is further

Ordered, that the Bill of Complaint be and the same is dismissed with costs to the defendant.

Dated: New York, October 15th, 1934.

Martin T. Manton, Robert P. Patterson, Murray Hulbert, United States Judge.

[fol. 382] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed Nov. 13, 1934

On this day came the Complainant, by Miller, Paul & Placer, its Solicitors, and presented its Petition for appeal and its Assignment of Errors, which have been duly filed, and upon consideration thereof, it is

Ordered and adjudged: That an appeal to the Supreme Court of the United States from the Order heretofore entered in the above entitled cause on the 18th day of October, 1934, denying said complainant's application for a preliminary injunction herein and granting the defendant's application for an Order and Decree dismissing the Bill of Complaint herein, be and the same hereby is allowed to said Complainant; that the bond on said appeal be fixed at the sum of $250, the same to be and act as a bond for costs but not as a supersedeas; that a certified copy of the record on which said Order was based and the opinion by this Court upon said application herein, be transmitted in due course to the Supreme Court of the United States.

Dated, New York, N. Y., November 9th, 1934.

Robert P. Patterson, U. S. D. J.

Service admitted.

[File endorsement omitted.]

[fol. 383] In United States District Court

[Title omitted]

Assignment of Errors—Filed Nov. 13, 1934

Now comes the Complainant-Appellant in the above entitled cause and in connection with its Petition for appeal,

files the following Assignment of Errors upon which it will rely on its appeal to the Supreme Court of the United States from the Order of the United States District Court, Southern District of New York, entered October 18th, 1934, in the above entitled cause, denying the complainant-appellant's application for a preliminary injunction and granting the defendant-appellee's application dismissing the Bill of Complaint herein on the merits:

1. The Court erred in not finding that the Code of Fair Competition for the Motor Vehicle Retail Trade, is null, void and invalid, having been adopted and approved by the President of the United States in violation of the National Industrial Recovery Act (48 Stat. 195) and being part of Title 15 of the United States Code, and part of Title 15 of U. S. C. A. (Commerce & Trade) and being Sections 701 to 712 inclusive.

2. The Court erred in not finding that Article IV of the Code of Fair Competition for the Motor Vehicle Retail Trade, is null, void and invalid and unconstitutional, being repugnant to the 14th amendment of the Constitution of the United States.

[fol. 384] 3. The Court erred in not finding that Chapter 781 of the Laws of 1933 of the State of New York, is null, void, invalid and unconstitutional.

4. The Court erred in holding that the National Industrial Recovery Act (48 Stat. 195) was constitutional.

5. The Court erred in holding and deciding that the Code of Fair Competition for the Motor Vehicle Retail Trade was constitutionally enacted.

6. The Court erred in holding that Chapter 781 of the Laws of 1933 of the State of New York, was validly enacted by the Legislature of the State of New York.

7. The Court erred in holding and finding that Chapter 781 of the Laws of 1933 of the State of New York, did not provide for excessive punishment.

8. The Court erred in holding and finding that Chapter 781 of the Laws of 1933 of the State of New York, was not an improper delegation of legislative function of the Legislature of the State of New York, in violation of the Constitution of the State of New York.

9. The Court erred in holding and finding that Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade, did not deprive the complainant of its rights, liberty and property, without due process of law.

10. The Court erred in holding and finding that Congress was vested with authority to regulate the matters expressed in the said National Industrial Recovery Act (48 Stat. 195).

11. The Court erred in holding and finding that the Code of Fair Competition for the Motor Vehicle Retailing Trade, so far as the provisions thereof permit of the regulation of the prices on trade-ins, was valid and constitutional.

[fol. 385] 12. The Court erred in holding and finding that the National Industrial Recovery Act did not provide for excessive punishment.

13. The Court erred in holding and finding that Congress did not improperly and illegally delegate its legislative functions and powers to the President of the United States.

14. The Court erred in holding and finding that the National Industrial Recovery Act and the Code of Fair Competition for the Motor Vehicle Retailing Trade, adopted and approved pursuant thereto, do not and did not deprive the complainant of its rights, liberty and property, in derogation and violation of the Fifth Amendment to the Constitution of the United States.

15. The Court erred in holding and finding that Chapter 781 of the Laws of 1933 of the State of New York, grants any direct or implied power to determine maximum prices on trade-ins.

16. The Court erred in failing to hold and find that the Code of Fair Competition for the Motor Vehicle Retailing Trade, so far as the provisions thereof permit price regulation and the fixation of maximum prices on trade-ins, is invalid and void as beyond the scope of the National Industrial Recovery Act, and unconstitutional under the Fifth and Fourteenth Amendments of the Constitution of the United States.

17. The Court erred in holding and finding that Chapter 781 of the Laws of 1933 of the State of New York, was not void, invalid and unconstitutional for indefiniteness.

18. The Court erred in holding and finding that the price of trade-ins on motor vehicles can be regulated by the [fol. 386] State of New York under Chapter 781 of the Laws of 1933 thereof.

19. The Court erred in holding and finding that Congress was vested with power and authority to regulate the maximum prices to be paid by automobile dealers on trade-in automobiles.

20. The Court erred in holding and finding that the Complainant herein was not entitled to pay on traded-in automobiles an amount which the complainant determined to be the fair and reasonable value of said traded-in automobile.

21. The Court erred in holding and finding that the Code of Fair Competition for the Motor Vehicle Retailing Trade and Chapter 781 of the Laws of 1933 of the State of New York, was valid under Article III, Section 17 of the New York State Constitution.

22. The Court erred in holding and finding that the method of ascertaining the maximum allowance on trade-in automobiles under Article IV, Subdivision A of the Motor Vehicle Retail *Code*, was fair, reasonable and just, and in not finding that the same was unfair, unreasonable, arbitrary and capricious.

23. The Court erred in holding and finding that the complainant was not permitted to sell below or give a discount on the factory list price of new automobiles.

24. The Court erred in failing to hold and find that paragraph 2 of Subdivision B of Article IV of the Code of Fair Competition of the Motor Vehicle Retailing Trade, was unconstitutional and deprived the complainant of its rights, liberty and property, without due process of law.

25. The Court erred in finding that paragraph 2 of Subdivision B of Article IV, was fair, reasonable and just, and in not finding that the same was unfair, unreasonable [fol. 387] and capricious.

26. The Court erred in holding and finding that price regulation as permitted by the Code of Fair Competition

for the Motor Vehicle Retailing Trade, adopted pursuant to the National Industrial Recovery Act, and filed pursuant to Chapter 781 of the Laws of 1933 of the State of New York, does not violate the Constitution.

27. The Court erred in holding and finding that the Code of Fair Competition for the Motor Vehicle Retailing Trade does not deny the complainant the equal protection of the law.

28. The Court erred in holding and finding that Congress was vested with power to regulate and control the local intrastate business of a motor vehicle dealer.

29. The Court erred in holding and finding that the Code of Fair Competition for the Motor Vehicle Retailing Trade, was not a statute but a mere administrative product of the President's application of the National Industrial Recovery Act.

30. The Court erred in holding and finding that by the provisions of Chapter 781 of the Laws of 1933 of the State of New York, the Legislature of the State of New York did not abdicate and delegate its legislative functions to the Congress of the United States, to the President of the United States, and to persons other than the Legislature of the State of New York.

31. The Court erred in failing and refusing to grant the complainant's application for a temporary injunction.

32. The Court erred in holding and finding that the Bill of Complaint did not allege a cause of action.

[fol. 388] Wherefore, complainant prays that the decision of the District Court and the Order entered thereon be reversed, and that the said District Court of the United States for the Southern District of New York, be directed to enter an Order vacating and setting aside its said Order dated October 18th, 1934, and be directed to enter an Order granting an interlocutory injunction as prayed for in the Bill of Complaint, restraining, enjoining and prohibiting the defendant from commencing any threatened criminal prosecution against the complainant for any alleged violation of

the provisions of the Code of Fair Competition for the Motor Vehicle Retail Trade.

Dated, New York, N. Y., November 9th, 1934.

Miller, Paul & Placer, Attorneys for Complainant Appellant, Office & P. O. Address, 276 Fifth Avenue, Borough of Manhattan, City of New York.

Service admitted.

[File endorsement omitted.]

[fol. 389] RECITAL AS TO BOND

Cost bond on Appeal in the sum of $250.00 was served duly approved by Robert P. Patterson, U. S. D. J. on November 13th, 1934 and filed in U. S. District Court, Southern District of New York.

[fols. 390-392] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed Nov. 13, 1934

You are hereby notified, that the United States District Court for the Southern District of New York, has filed and entered an Order allowing an appeal to the Supreme Court of the United States, from the Order signed, filed and entered on the 18th day of October, 1934, in the above entitled cause, and that the Order allowing the appeal makes the same returnable on the 8th day of December, 1934.

Dated, New York, N. Y., November 12th, 1934.

Miller, Paul & Placer, Attorneys for Complainant, Office & P. O. Address, 276 Fifth Avenue, Borough of Manhattan, City of New York.

To John J. Bennett, Jr., Esq., Attorney General of the State of New York, New York, N. Y. David Blitzer, Esq., Asst. District Attorney, Harold H. Straus, Esq., Asst. District Attorney, Solicitors for the Defendant.

Receipt of the foregoing Notice is hereby acknowledged this 13th day of November, 1934.

—— ——, Attorney General of State of New York.

Service Admitted.

Harold H. Straus, Asst. Dist. Atty., Solicitors for defendant.

[File endorsement omitted.]

[fol. 393] Citation in usual form showing service—Filed Nov. 13, 1934, omitted in printing.

[fol. 394] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 395] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT THE ENTIRE RECORD—Filed Dec. 8, 1934

The Appellant will, in brief and in oral argument on the hearing of the appeal for a reversal of the Order of the District Court denying Complainant's application for a preliminary and temporary injunction, and granting the defendant's application to dismiss the Bill of Complaint, rely on the Assignment of Errors as and for its points herein.

And the Appellant further states that the whole of the Record as filed, is necessary for the consideration of the case.

Dated, New York, N. Y., November 10th, 1934.

Miller, Paul & Placer, Attorneys for Complainant, Office & P. O. Address, 276 Fifth Avenue, Borough of Manhattan, City of New York.

Service of the foregoing Statement of Points to be relied upon and designation of the parts of the Record to be printed, and receipt of a copy thereof are hereby accepted and acknowledged, this — day of November, 1934.

—— ——, Attorney General of the State of New York, Esq. Harold H. Straus, Asst. District Atty., Attorney and Solicitor for Defendant.

[fol. 396] [File endorsement omitted]

[Endorsed on cover:] File No. 39,195. S. New York, D. C. U. S. Term No. 567. Spielman Motor Sales Co., Inc., Appellant, vs. William C. Dodge, as District Attorney of New York County, State of New York. Filed December 8, 1934. File No. 567 O. T. 1934.